THE ARMY LAWYER

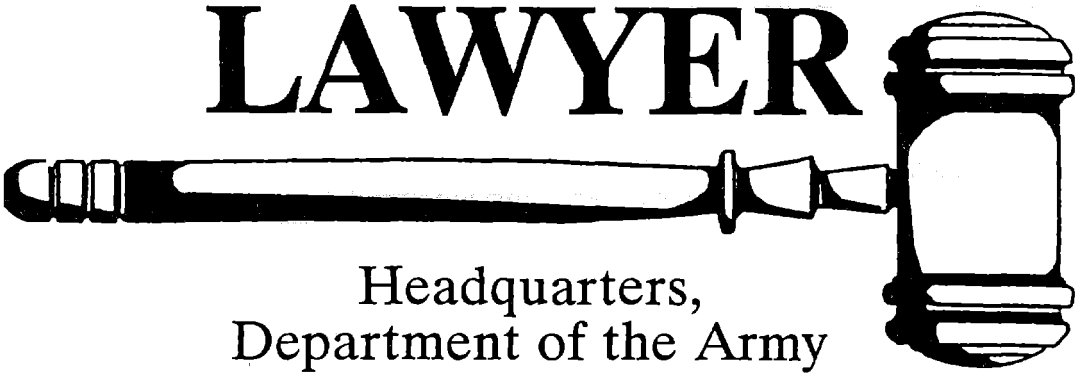

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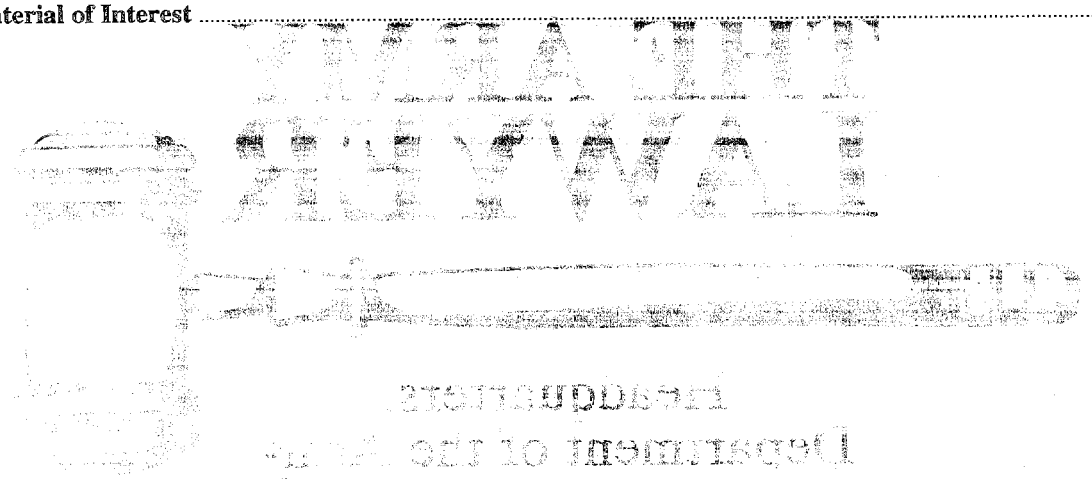
Table of Contents



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Using Residual Hearsay

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Introduction

What happens when a child witness who is an alleged victim of sexual abuse, will not or cannot testify at trial and previously has given a statement alleging the abuse? Or, what happens when a witness testifies, or is expected to testify, and previously has made an out-of-court statement that is materially different or even contradictory to the evidence that the witness is presenting, or is expected to present, on the stand? Because this inconsistent statement was made out of court—and unless it is a statement made by a witness as defined under Military Rule of Evidence (MRE) 801(d)(1) or an admission by a party-opponent—it likely will be considered hearsay.[1] More difficulty exists in a sexual crime—such as the first example cited above—because the alleged crime is intimate, may have no other witnesses but the accused, and may involve little corroborating physical evidence.

In such a case, the outcome may hinge on the out-of-court statement. If the counsel intends to offer the statement for its truth, it will be considered hearsay, and inadmissible, unless counsel successfully argues that the statement is not hearsay at all as defined by MRE 801, or that it falls under one of the exceptions delineated in MRE 803 or 804.[2] Often, the witnesses making such statements are alleged victims and frequently—because their statements are not excited utterances,[3] or given for the purposes of medical treatment[4]—the only likely avenues of admission are the so-called residual exceptions of MRE 803(24) and 804(b)(5). Much has been written about residual hearsay from a variety of viewpoints in recent years.[5] This article will (1) examine these two residual exceptions in light of the rationale behind excluding hearsay evidence, recent case law, and commentators' analyses; (2) indicate methods of admissibility by listing a consistent set of factors military courts have used; and (3) provide alternative methods of admissibility to the residual exceptions.

Hearsay Generally

Hearsay is defined as a "statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted."[6] Hearsay is inadmissible, unless the hearsay statement falls under the so-called exceptions of MRE 803 and 804. Before an examination of these exceptions can begin, especially of the residual exceptions, one must analyze why hearsay evidence is considered inadmissible. In other exclusionary rules—such as search and seizure—the exclusion rests on how the evidence was obtained, not on the evidence itself. The objection to hearsay, however, is made precisely because it is hearsay.[7] Its exclusion has its roots in common experience: intuitively, people will prefer first-hand information on serious matters, especially when momentous decisions must be made.[8] Momentous decisions are made especially in criminal trials where fact finders must decide the guilt or innocence of the accused.

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[1] The counsel who has relied on this previous statement may impeach the witness using it, but has major difficulty when attempting to use it substantively. The evidence is restricted in such a case from using it for that purpose. MANUAL FOR COURTS-MARTIAL, United States, MIL. R. EVID. 105 (1984) [hereinafter MCM]. Impeachment is permitted, but the rule allowing it is not intended "to permit the introduction of inconsistent statements where there is no reason other than to attempt to bring hearsay before the court members." *Id.* MIL. R. EVID. 607; *see also* STEPHEN A. SALTZBURG ET AL., MILITARY RULES OF EVIDENCE MANUAL, at 640 (3rd ed. 1991) (editorial comment to MRE 607).

[2] MCM, *supra* note 1, MIL. R. EVID. 801, 803, 804.

[3] *Id.* MIL. R. EVID. 803(2).

[4] *Id.* MIL. R. EVID. 803(4).

[5] *See, e.g.,* Holmes, *The Residual Hearsay Exceptions: A Primer for Military Use,* 94 MIL. L. REV. 15 (1981); Child, *Effective Use of Residual Hearsay,* ARMY LAW., July 1985, at 24; Clervi, *Military Rule of Evidence 803(24)(B) and the Available Witness,* ARMY LAW., Nov. 1986, at 51; Hooper, *The Residual Hearsay Exception: An Overview for Defense Counsel,* ARMY LAW., July 1990, at 29.

[6] MCM, *supra* note 1, MIL. R. EVID. 801(c). The following are not considered hearsay: a prior statement made by a witness under oath that is inconsistent with the declarant's testimony and was made at trial or other hearing; a statement that is consistent with the declarant's testimony and is offered to rebut an express or implied charge of fabrication or improper motive; or one of identification of a person made after perceiving the person. In addition, admissions in the forms described in MRE 801(d)(2) are not hearsay.

[7] Mortimer R. Kadish & Michael Davis, *Defending the Hearsay Rule,* 8 LAW AND PHILOSOPHY, Dec. 1989, at 335.

[8] Christopher B. Mueller, *Post Modern Hearsay Reform: The Importance of Complexity,* MINN. L. REV., 383 (Feb. 1992); *see also* MCM, *supra* note 1, MIL. R. EVID. 602.

If the only reason for exclusion was a preference for first-hand information, however, the case for making hearsay inadmissible is less compelling. A simple preference for one type of evidence is not a compelling reason to omit or exclude another type. Instead, the reliability of a piece of evidence often goes to that evidence's "weight," not its admissibility. Another argument against hearsay is that the declarant of the statement often is not subject to cross-examination.[9] Wigmore specifically described cross-examination as "the greatest legal engine ever discovered for the discovery of truth"[10] and the introduction of hearsay evidence removes much of cross-examination's truth-discovering power. According to Wigmore:

> The theory of the hearsay rule . . . is that the many possible sources of inaccuracy and untrustworthiness which may lie underneath the bare untested assertion of a witness can best be brought to light and exposed, if they exist, by the test of cross-examination. But this test or security may in a given instance be superfluous; it may be sufficiently clear in that instance, that the statement offered is free enough from the risk of inaccuracy and untrustworthiness, so that the test of cross-examination would be a work of supererogation.[11]

Wigmore's statement highlights three important propositions: (1) cross-examination is the best way to test a witness's statements; (2) hearsay statements generally cannot be so tested; and (3) nevertheless, cross-examination is not an end or value in itself—if a statement is trustworthy enough, cross-examination may be unnecessary, and a hearsay statement can be admitted.

The hearsay rules appear to be congruent, if not identical, to the Confrontation Clause of the Sixth Amendment, and the Supreme Court in *White v. Illinois* recently reinforced this theory by reasserting that "hearsay rules and the Confrontation Clause are generally designed to protect similar values."[12] Yet, the Supreme Court's use of the word "similar" is critical: the values are only similar; the Confrontation Clause and hearsay rules are not the same. In the example cited at the beginning of this article—in which the witness actually appears and testifies—the Confrontation Clause has been satisfied, but the hearsay rules are still in operation.

With this example in mind, one can return to the seemingly tautologous statement that hearsay is objectionable because it is hearsay. A hearsay statement has four inherent defects that can infect it and compromise accurate testimony: (1) the risk of insincerity or deception; (2) the risk of impaired perception; (3) the risk of defective memory; (4) the risk of a defect in narration.[13] While these defects may inhere in any statement, they are especially dangerous when they occur in hearsay statements, because the declarant may not be subject to cross-examination. And even if the witness is present at trial, that only mitigates, but cannot remove, these risks, because the circumstances surrounding the making of the statement cannot be replicated. These risks are considered so dangerous as to warrant a statement's exclusion. A statement that falls under an enumerated exception presumably has a lower risk. Because a statement that does not fall under an exception retains a much higher risk, a much more careful analysis of the statement must be made.

History of Residual Hearsay

Judges often have used their discretion in determining whether hearsay statements should be admitted. For residual hearsay, the landmark case prior to federal codification was *Dallas County v. Commercial Union Association*.[14] The court upheld the admission of a fifty-eight-year-old newspaper article even though the article was hearsay and did not fit any previous exception. The court decided that it was unlikely that the reporter who wrote the article would have falsified its contents and that a low probability existed that a competent witness could be found to testify about events that occurred fifty-eight years ago.[15] This case illustrates the difficulty in codifying all the variants of a rule, and in individual cases, the importance of judicial discretion in determining, on a case-by-case basis, when to allow a variant to the rule.

The federal law in the residual hearsay arena, however, developed unusually because of the subsequent development, and ultimate codification, of the hearsay rules of evidence. This codification took place approximately ten years after *Dallas County,* but only after considerable debate and dispute.

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[9] Kadish & Davis, *supra* note 7, at 336.

[10] JOHN H. WIGMORE, WIGMORE ON EVIDENCE, § 1367 (3d ed. 1940).

[11] *Id.* § 1420.

[12] 112 S. Ct. 736, 741 (1992) (quoting California v. Green, 399 U.S. 74, 86 (1970)).

[13] G. WEISSENBERGER, WEISSENBERGER'S FEDERAL EVIDENCE, § 801.1 at 332 (1987).

[14] 286 F.2d 388 (5th Cir. 1961).

[15] *Id.* at 398.

Originally, the Congress's Advisory Committee on Proposed Rules of Evidence had offered a list of twenty-three "illustrations" and a general provision stating that "A statement is not excluded by the hearsay rule if its nature and the special circumstances under which it was made offer assurances of accuracy not likely to be enhanced by calling the declarant as a witness, even though he is available."[16] In a revised draft two years later, the advisory committee concluded

> The preceding 23 exceptions of Rule 803 and the first five exceptions of Rule 804(b) . . . are designed to take full advantage of the accumulated wisdom and experience of the past in dealing with hearsay. It would be presumptuous to assume that all possible desirable exceptions to the hearsay rule have been catalogued and to pass to oncoming generations as a closed system.[17]

In that two-year-period, however, the rule had been altered significantly. In an interesting example of lawmaking, the twenty-three "illustrations"—meant to be used as examples only—became codified as actual exceptions without any clear reason why this was done.[18] A residual hearsay exception was created that required "comparable circumstantial guarantees of trustworthiness" similar to the other exceptions, and a note was added indicating that the residual exception did not contemplate "unfettered discretion" by the judiciary.[19] After debate in both houses of Congress, the created residual exceptions became Federal Rules of Evidence (FRE) 803(24) and 804(b)(5), identical to the Military Rules of Evidence, which later were adopted.[20]

In codifying the residual hearsay exceptions, the Senate Judiciary Committee stated "It is intended that the residual hearsay exceptions will be used very rarely, and only in exceptional circumstances . . . [t]he residual exceptions are not meant to authorize major judicial revisions of the hearsay rule . . . [s]uch measures are best accomplished by legislative action."[21] Indeed, in admitting such out-of-court statements in a child sexual abuse case, a judge may appear to be doing exactly what the Judiciary Committee cautioned against. Twenty-eight states have enacted exceptions to their own hearsay rules to allow—under certain conditions—children's statements in sexual abuse cases to be admissible.[22]

The analysis does not end here because, after all, legislative history is history, not law. The words "exceptional circumstances" used by the Senate Judiciary Committee are not contained in the actual residual hearsay rules. Moreover, the meaning of "used very rarely" likewise is unclear. One may speculate whether it refers to a judge's time on the bench or the particular type of case. One further can question how often "very rarely" really is—whether it means once a month, a year, or a decade. Indeed, the very stringency of the requirements for residual hearsay—particularly the qualification that the evidence be the most probative available and that it have equivalent circumstantial guarantees of trustworthiness—probably will ensure that the residual hearsay rule is used infrequently, so resorting to this legislative history may be superfluous.

Despite the caution to use the residual exceptions only rarely, federal courts have often used them as they have seen fit. As the Fifth Circuit stated in *United States v. Mathis*, "Rule 803(24) was designed to encourage the progressive growth and development of federal evidentiary law by giving the courts the flexibility to deal with new evidentiary situations which may not be pigeonholed elsewhere."[23] Interestingly, in the following sentence, the court stated, "Yet tight reins must be held to insure that this process does not emasculate our well-developed body of law and the notions underlying our evidentiary rules."[24]

This tension has resulted in a hodgepodge of different standards being applied in different federal circuits; some circuits have interpreted the rule loosely, others have been more stringent.[25] Because the military's rule is identical to the federal

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[16] Preliminary Draft of Proposed Rules of Evidence for the United States District Courts and Magistrates, 46 F.R.D. 161 (1969).

[17] Revised Draft of Proposed Rules of Evidence for the United States District Courts and Magistrates, 51 F.R.D. 315, (Rule 803 (24)), 437 (note to rule 803(24)) [hereinafter Revised Draft].

[18] *See* Joseph W. Rand, *The Residual Exceptions to the Federal Hearsay Rule: The Futile and Misguided Attempt to Restrain Judicial Discretion,* 80 GEO. L.J. 873, 876-78 (1992).

[19] Revised Draft, *supra* note 17, at 422.

[20] *See* Rand, *supra* note 18, at 878.

[21] S. REP. NO. 1277, 93d Cong., 2d Sess. at 20 (1974), *reprinted in* 1974 U.S.C.C.A.N. 7051, 7066.

[22] *See, e.g.,* ALA. CODE § 15-25-31, 15-25-34 (1990) (enacted 1989); ARIZ. REV. STAT. ANN. § 5.13-141.6 (1989) (enacted 1989); COLO. REV. STAT., § 5.13-25-129 (1987) (other states include Arkansas, Florida, Idaho, Minnesota, and Ohio); *see also* Mary Misener, *Children's Hearsay Evidence in Child Sexual Abuse Prosecutions: A Proposal for Reform,* 33 CRIM. L. Q., 1990-91, at 377.

[23] 559 F.2d. 294, 299 (5th Cir. 1977).

[24] *Id.*

[25] *See* Rand, *supra* note 18, at 877-85 for an illustration of the many different standards that have been used.

rule, the drafters intended it to "be employed in the same manner as it is generally applied in the Article III courts."[26] Therefore, when the military adopted the identical rules for residual hearsay in 1979, it adopted a rule that subsequently has caused difficulty and sometimes even confusion within its own judicial system.[27]

Military Rule of Evidence 803(24) makes admissible

> [a] statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party with a fair opportunity to prepare to meet it, the intention to offer the statement and the particulars of it, including the name and address of the declarant.[28]

Military Rule of Evidence 804(b)(5), which deals with unavailable witnesses, has identical language. Since the residual hearsay exceptions have been adopted, the military courts frequently have addressed the admissibility of evidence under the provisions of MRE 803(24) and 804(b)(5).

Clauses (A) and (C) of MRE 803(24) have been the subject of little controversy. Establishing that a statement is offered as evidence of a material fact—a fact that is central and important to the case—generally is very uncomplicated. While an opposing counsel may say—in the interests of justice—that residual hearsay only should be used rarely, in the area of familial abuse cases, the Army Court of Military Review (ACMR) in *United States v. Rousseau* has stated that "[m]ilitary society has a compelling interest in protecting the welfare of a soldier's family. For that reason, the residual hearsay exceptions are particularly well suited to the type of hearsay problems which arise when one family member falls victim to the aggressions of another family member."[29]

Over the past thirteen years, the other parts of the rule, in particular, what are meant by "more probative . . . than any other evidence," and "equivalent circumstantial guarantees of trustworthiness" have been the source of debate and controversy. Consequently, military courts have determined the admissibility of residual hearsay statements by examining their probative value and on the basis of a number of reoccurring factors to determine whether the statements are trustworthy enough to warrant admission. In contrast to the vast number of federal courts, using a broad range of different factors, the military courts—because they only have one court of appeals—have been more standard in applying these factors. Consequently, it is easier to compile a list of the criteria which the military courts consider in making an admissibility determination.

The Judicial Standard

Any discussion of these criteria should be prefaced by examining the judicial standard for admissibility. Admitting evidence under the provisions of MRE 803(24) or 804(b)(5) lies within the sound discretion of the military judge, and this decision will not be disturbed unless the military judge clearly abuses that discretion.[30] Abuse of discretion, however, is a somewhat amorphous concept. In applying his or her discretion, the judge is allowed great leeway in making a determination and is not bound by the rules of evidence except those dealing with privilege.[31] Thus, for example, the military judge can consider other inadmissible hearsay when making his or her determination whether a statement should be admitted.

An important federal case dealing with residual hearsay, *Huff v. White Motor Corp.* contains a standard definition of an abuse of discretion.[32] The Seventh Circuit in *Huff* stated that if an appellate court arrives at a "definite and firm conviction that the court below committed a clear error of judgment in the conclusion it reached and that the error was prejudicial, [the appellate court] must reverse . . . ."[33] The standard is par-

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[26] MCM, *supra* note 1, MIL. R. EVID. 803(24), SALTZBURG, *supra* note 1, at 812 (Drafters Analysis of MRE 803(24)).

[27] Exec. Order No. 12,198 (12 Mar. 1980).

[28] MCM, *supra* note 1, MIL. R. EVID. 803(24).

[29] 21 M.J. 960, 965 (A.C.M.R. 1986).

[30] *See* Holmes, *supra* note 5, at 36-42.

[31] MCM, *supra* note 1, MIL. R. EVID. 104(a).

[32] 609 F.2d 286, 291-92 (7th Cir. 1979) (quoting *In re* Josephson, 218 F.2d 174, 182 (1st Cir. 1954) (citations omitted).

[33] *Id.* at 291.

ticularly important in cases dealing with residual hearsay. The lower court judge usually has admitted evidence that is critical—often a statement by an alleged victim. The court then must scrutinize carefully the statement's reliability. Military courts have accepted or rejected statements not only for one reason, but for several reasons taken together.

The Case of *Idaho v. Wright*

In 1990, the United States Supreme Court in *Idaho v. Wright*, further delimited the military judge's discretion in determining whether or not residual hearsay should be admitted.[34] The Idaho Supreme Court had ruled that statements made by a two-and-one-half-year-old alleged victim of sexual abuse to a pediatrician were inadmissible because their admission violated the Sixth Amendment's Confrontation Clause. The Idaho Supreme Court held that the statements did not fall within a traditional hearsay exception and lacked "particularized guarantees of trustworthiness."[35] The Supreme Court affirmed the Idaho Supreme Court's decision. Relying on its previous opinion, *Ohio v. Roberts*,[36] the Supreme Court stated that the standard for admitting hearsay was that the counsel seeking to admit the evidence must produce or demonstrate the unavailability of the declarant whose statement the counsel intends to use and the statement only can be admitted if it has "adequate indicia of reliability"—also known as "particularized guarantees of trustworthiness."[37] Having previously noted in *Ohio v. Roberts* that "reliability is inferred without more in a case which falls within a firmly rooted hearsay exception,"[38] the Court then examined the evidence in *Wright*, noted it did not fall within such an exception, and stated that such evidence must be so reliable that testing by cross-examination would add little to its reliability.[39]

Furthermore, the Supreme Court in *Wright* stated that guarantees that make such evidence reliable must be drawn from the circumstances that surround the making of the statement and render it worthy of belief and "not by reference to other evidence at trial."[40] Allowing such corroborating evidence to be used would "permit admission of a presumptively unreliable statement by bootstrapping on the trustworthiness of other evidence at trial."[41] The Supreme Court, therefore, stated that the lower court's reliance on the presence of physical evidence to indicate abuse, the opportunity of the respondent to commit the offense, and the older daughter's corroborating identification of the accused were "irrelevant to a showing of . . . 'particularized guarantees of trustworthiness.'"[42] The remaining factors that the lower court considered—whether the child had a motive to lie in making the statements and whether the statements were of the type that one would expect a child to fabricate—were relevant and could be used.[43]

The Problem of Corroboration in *Idaho v. Wright*

Idaho v. Wright is a watershed case in the area of residual hearsay, but it leaves some unresolved problems. For example, when its standard of admissibility applies is unclear. In his concurring opinion in *United States v. Lyons*, Judge Cox asked whether the prohibition against using other evidence at trial to show the statement's reliability—such as corroborating physical evidence—applies "when the witness is available for confrontation or whether a lesser standard exists?"[44] The entire premise of the restriction rests on the inability to cross-examine the declarant at trial. Logically, if the declarant is available, the restriction should not apply. Indeed, of the twenty-eight states that have a specific hearsay exception for a child's out-of-court statement, fifteen require corroboration of the act the statement speaks of before the statement of an unavailable child can be admitted.[45] What the Supreme Court expressly forbids, fifteen state statutes explicitly require for an unavailable witness, much less an available one. Nevertheless, the Criminal Law Division of the Office of the Judge Advocate General, United States Army, sent a message in July 1990 stating that *Idaho v. Wright*

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[34] 110 S. Ct. 3139 (1990).

[35] *Id.* at 3152-53.

[36] 100 S. Ct. 2531 (1980).

[37] *Wright*, 110 S. Ct. at 3146-47.

[38] *Id.* at 3146 (quoting *Roberts* at 2539).

[39] *Id.* at 3150.

[40] *Id.*

[41] *Id.*

[42] *Id.*

[43] *Id.*

[44] 36 M.J. 183, 188 (C.M.A. 1992).

[45] The states requiring corroboration of the act are: Colorado, Florida, Idaho, Illinois, Indiana, Maryland, Minnesota, Mississippi, New Jersey, Oklahoma, Oregon, Pennsylvania, South Dakota, Utah, and Washington (taken from NATIONAL INSTITUTE OF JUSTICE, WHEN THE VICTIM IS A CHILD, 91 (2d ed. 1992)) [hereinafter WHEN THE VICTIM IS A CHILD].

> overrules military cases which indicate that corroboration and reputation of declarant for trustworthiness may be used to satisfy the Sixth Amendment requirements. . . . Rather than relying on the residual hearsay rules, counsel would be wise to rely upon the firmly rooted hearsay exceptions [such as] Military Rules of Evidence 803(2), 803(3), 803(4), 804(b)(1), and 801(D)(2)(E).[46]

The military courts in recent cases, however, increasingly are questioning such a sweeping interpretation of *Wright*. In addition to Judge Cox's question in the *Lyons* case, Judge Crawford, in her concurrence, stated that because the witness was available, the *Idaho v. Wright* restriction should not apply.[47] In *United States v. Martindale*,[48] the relationship between the Confrontation Clause and the hearsay rules received the most extensive analysis in any military case following *Wright*.[49] In *Martindale*, which involved alleged child sexual abuse, the lower court admitted a child's out-of-court statement under the residual hearsay rule. The child had testified at a pretrial hearing and recalled talking to NIS agents, but "either could not remember acts of sexual abuse or chose not to."[50] In admitting the statements, the lower court judge found the child unavailable under MRE 804(a)(2) (persistent refusal to testify) and MRE 804(a)(3) (lack of memory). The Navy-Marine Corps Court of Military Review (NMCMR), however, found the child available for Confrontation Clause purposes, "[T]he presence of the witness and the content of the expected testimony were sufficient to satisfy the Confrontation Clause's requirement to afford the opportunity for effective cross-examination."[51]

Having made this critical distinction, the NMCMR went even further and distinguished the requirements of the Confrontation Clause's "particularized guarantees of trustworthiness" and residual hearsay's "equivalent circumstantial guarantees of trustworthiness" as not being identical.[52] Noting that the Confrontation Clause "focuses primarily on the mechanism of cross-examination . . . [and] directly promotes a symbolic value—public confidence in the fact-finding process"[53]—the NMCMR further said

> The objective of the hearsay rules appears to be more pragmatic . . . we are of the view that if the fundamental objectives of the Confrontation Clause, including its symbolic goal, have been achieved, there is no purpose to loading baggage on the hearsay rules which interferes with their sole objective of advancing the quest for the truth. More specifically, we see no reason to impose an arbitrary limitation on the range of circumstances the military judge may consider when determining whether hearsay possesses "equivalent circumstantial guarantees of trustworthiness" justifying its admission to the hearsay rule . . . when the Confrontation Clause is otherwise satisfied, the military judge possesses the discretion to consider the totality of circumstances *including* corroborating evidence, in determining whether hearsay has "equivalent circumstantial guarantees of trustworthiness . . . ."[54]

The Air Force Court of Military Review (AFCMR)—in *United States v. Hansen*[55]—was even more restrictive in its view of *Wright*. The AFCMR found that the Supreme Court's delimitation only applied to the extrinsic corroborating evidence in the case of *Wright itself*, that is,

> the testimony of the declarant's sister, and the results of the declarant's physical examination. Because there was no evidence of any admissions by the defendant that factor was not before the Court in *Wright*. Therefore . . . we do not believe *Wright* precludes, in all cases, looking to an accused's confession or admissions when assessing the reliability of a hearsay statement[56]

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[46] Message, Dep't of Army, DAJA-CL 111600Z, SUBJECT: Hearsay Rules (July 1990).

[47] *Lyons*, 36 M.J. at 188-89.

[48] 36 M.J. 870 (N.M.C.M.R. 1993).

[49] *Id.* at 875.

[50] *Id.* at 877.

[51] *Id.* at 877-80.

[52] *Id.* at 880.

[53] *Id.*

[54] *Id.*

[55] 36 M.J. 599, 607 (A.F.C.M.R. 1992).

[56] *Id.*

Consequently, the AFCMR ruled that the use of the accused's confession to corroborate a child's out-of-court statement was proper.

The military courts apparently are distinguishing the initial view about corroboration and a strong possibility exists that the United States Court of Military Appeals (COMA) will hold that *Idaho v. Wright* does not apply when a witness is considered available for Confrontation Clause purposes. The possibility also exists that the Supreme Court itself may modify its stance. *Idaho v. Wright* was narrowly decided by a five to four vote with a vigorous dissent by Justice Kennedy.[57] In some ways, *Wright* appears to be an oddly reasoned decision. The premise for the delimitation is hard to grasp because no statement exists in a vacuum, but always is judged in relation to other statements and events. For example, in determining whether a statement is an excited utterance under MRE 803(2), the military judge first must find whether the event that triggered the utterance would be considered startling. The problem is compounded when one examines the two factors the Supreme Court allowed for consideration—the child's use of unexpected terminology and the absence of motivation to fabricate. How can these factors be used without reference to other reliable extrinsic evidence to show such use was unexpected and the child was not fabricating?

Any counsel who intends to use residual hearsay should be aware of the current controversy surrounding corroborative evidence. From a conservative viewpoint, it might be wise to refrain from using corroborative evidence until the COMA provides further clarification. If a witness is "available" to satisfy the Confrontation Clause, however, a strong argument can be made that the judge is within his or her discretion to consider corroborating evidence prohibited by *Wright*.

Factors for Admissibility

Looking at the military cases over the past thirteen years, and keeping in mind the controversy surrounding *Idaho v. Wright*, counsel can use a checklist as a guide in determining whether a statement can be admitted under the provisions of MRE 803(24) or 804(b)(5). In the case law, military courts consistently have used twelve criteria, or factors—apart from corroborative evidence—in determining whether a statement should be admitted as residual hearsay. For the moving counsel, the more of these criteria that can be satisfied, the greater the odds for successful admission.

The twelve factors that military courts have considered for admitting residual hearsay are: (1) whether other equally probative evidence is available; (2) whether proper notice has been given that residual hearsay is to be used; (3) whether a clear showing has been made as to why the evidence is required; (4) whether the declarant's statement was taken under oath or sworn; (5) whether the statement was written in his or her own hand, by someone else, or videotaped; (6) whether the statement was detailed; (7) whether the taking of the statement took place in a noninterrogatory setting; (8) whether the statement was made to a disinterested third party; (9) whether leading questions were asked of the declarant; (10) whether the declarant is available or whether the unavailability has been clearly established; (11) if a child was the declarant, whether the statement was beyond the range of his or her experience; and (12) whether the state of mind of the declarant at the time the statement was made indicates the statement is reliable.

The twelve factors can be categorized further as follows:

1. Other equally probative evidence?

Trial Factors

2. Clear showing why evidence required?
3. Proper notice given?

Circumstantial Guarantees of Trustworthiness

Objective Factors

4. Statement under oath/sworn?
5. Statement handwritten/videotaped?
6. Statement detailed?
7. Statement made in noninterrogatory setting?
8. Statement made to disinterested third party?
9. Leading questions asked?

Subjective Factors

10. Witness available/unavailability established?
11. If child, beyond range of experience?
12. State of mind of declarant at time of statement?

Even though other commentators have created similar lists,[58] these factors, or factors similar to them, often are simply laid out in succession without any real attempt to understand the relationship between them. But these factors can be subdivid-

[57] 110 S. Ct. 3139, 3153 (1990) (Kennedy, J., dissenting).

[58] During the March 1993 Conference for Army judges in Washington D.C., a discussion took place on the use of factors for a judge to consider when deciding the admissibility of hearsay statements. One military judge subsequently submitted a list of factors that he used in determining "particularized guarantees of trustworthiness" when evaluating hearsay evidence. Generally the factors that he employed—apart from corroborating evidence—fall under one of the twelve developed here. However, as is noted in the letter that accompanied the factors, many of the factors predate *Wright* and "may no longer be viable." *See* Letter, JALS-TJ, United States Army Legal Services Agency, subject: Trustworthiness Factors in Evaluating Admissibility of Hearsay Statements Memorandum for All Military Judges (3 May 1993).

ed. Factor one—the question of the evidence's probative value—should be separated from the factors which indicate its truthfulness. Factors two and three are, for the most part, in the control of the counsel seeking admission of the evidence. Factors four through nine all are somewhat objective, and fairly easy to verify factually, though less within the control of the moving counsel. Factors ten through twelve are subjective factors, more difficult to verify, and generally not within the moving counsel's control.

Factor one establishes probative value. The second set of factors focus on the legal and procedural bases for admitting the statement—these "trial factors" determine how procedurally sound admission is. The third and fourth set of factors deal with "circumstantial guarantees of trustworthiness." The third set of factors focus not on who made the statement, but *to whom* the statement was made, while the fourth set of factors focus on the declarant and the declarant's mental state at the time the statements were made. Probative value is a question of controversy. On the other hand, the "trial factors" always should be achieved by the moving party. The third set (objective factors) and fourth set (subjective factors) need to be weighed in relation to one another—the actions of the person who received the statement in relation to the availability and the state of mind of the declarant. When examining the totality of these factors, if the evidence is more probative, if the "trial factors" have been achieved by the moving party, if the third set of factors indicate the statement is objectively reliable and the fourth set indicate the declarant's reliability, the requirements should be met and the counsel should succeed in having the statement admitted.

A second point to consider when using factors that assist in determining a statement's trustworthiness, is that the explicit language of the rule requires only *equivalent* circumstantial guarantees of trustworthiness, not *exceptional* circumstantial guarantees. Nothing requires that the statement be absolutely reliable.[59] A counsel seeking admission must be on guard of a judge who—albeit unintentionally—creates a near impossible standard. A judge should not run together the often invoked "used in exceptional circumstances" (itself not in the rule) with the "equivalent guarantees" standard to create an "exceptional guarantees" standard. The "exceptional" or "rare" standard arguably falls under the clause (C) "interests of justice" criterion in the rule. But the question "when should it be used?" should not be confused with "how reliable is it?" Rather, the proponent of the residual hearsay statement is required under the rule only to show that the statement has the same level of trustworthiness as the least trustworthy exception in MRE 803 and or 804.[60] With this in mind, an examination of the factors follows. Although this list is not complete, it encompasses many of the factors that can be utilized, in one form or the other, by military courts following *Idaho v. Wright*, regardless of the witness's availability.

The "Most Probative" Factor

Whether Other Equally Probative Evidence is Available

Both MRE 803(24) and 804(b)(5) make this an explicit requirement—the evidence cannot be "very probative" or "as probative" as other evidence, but the most probative concerning the particular issue at hand. Evidence has probative value "if it tends to prove the issue in dispute."[61] It generally has nothing to do with the credibility of a witness: "Credibility . . . goes to the quality or power of inspiring belief."[62] Evidence which is considered probative, on the other hand,

> denotes hearsay evidence that has a greater tendency in logic to establish the fact for which it is offered as more likely than other available evidence . . . . This means that the court must decide whether the link between the evidence and the fact for which it is offered is logically shorter and tighter than the link from other available evidence to the fact in issue.[63]

Where residual hearsay most often is used—child abuse cases—this requirement is satisfied when the all-too-familiar pattern occurs: a child makes an out-of-court statement about alleged abuse and then will not, or cannot, testify at trial. When this occurs, the "most probative" element is readily satisfied: the alleged crime probably has no other witnesses and little doubt exists that the statements by the alleged victim are the crucial evidence in the case.

While the "most probative" requirement may be rather easy to satisfy in such a case, instances may occur when statements made by someone other than the alleged victim are in fact the "most probative." In the federal case of *United States v. Shaw*, the Eighth Circuit permitted the testimony of a social worker to whom an eleven-year-old girl had revealed that she had been sexually abused.[64] Even though the girl had testified

[59] *See* Child, *supra* note 5, at 26 for further discussion.

[60] *See* United States v. Hines, 18 M.J. 729, 733-34 (A.F.C.M.R. 1986).

[61] United States v. Wiley, 36 M.J. 825, 829 (A.C.M.R. 1992) (quoting United States v. Ball, 547 F. Supp. 929 (E.D. Tenn. 1981)).

[62] *Wiley*, 36 M.J. at 830 (quoting *Webster's 3rd International Dictionary* at 532).

[63] *Id.* (quoting David A. Sonenshein, *The Residual Exceptions to the Federal Hearsay Rules: 2 Exceptions in Search of a Rule*, 57 N.Y.U. L. REV. 867 (1982).

[64] 824 F.2d 601 (8th Cir. 1987), *cert. denied*, 484 U.S. 1068 (1988).

at trial, the social worker was allowed to testify as to what the girl told her under the provisions of FRE 803(24). On review, the Eighth Circuit upheld the district court's ruling stating that

> The district court reasoned that [the social worker's] testimony was "more probative" than [the alleged victim's] for several reasons. [The social worker's] testimony reflected the first known testimony [the victim] made to anyone about the sexual incidents. The hearsay statements were made just days after the last sexual incidents. And most importantly, they contained specific details as to the dates of the incidents, details that [the victim] could not provide at trial.[65]

Especially in a case involving a young child, the point is not to assume that the child's testimony is necessarily the "most probative" available. If, however, counsel intend to introduce first known, recent, and detailed evidence as in *Shaw*, the record clearly must indicate that the evidence is more probative than the alleged victim's testimony.

In *United States v. Giambra*, on the other hand, the COMA stated that the victim's own testimony at trial was more probative than the mother's recounting of her daughter's statements.[66] It will be more difficult to show that an out-of-court statement is more probative when such a witness is available. Additionally, in *Giambra*, unlike *Shaw*, the mother did not provide specific details that the daughter was unable to provide. Similarly, in *United States v. Valdez*, the deceased victim had made statements to her sister that she had been beaten. The ACMR found that such evidence—admitted under MRE 804(b)(5)—was cumulative and therefore, inadmissible. Ample physical evidence existed to show that the child had been abused and neglected by the accused.[67]

The situation discussed at the beginning of this article—when a witness is available for trial, appears and testifies as a witness, and later recants the former testimony—would appear to be one of the most difficult scenarios for admissibility under the rules. After all, what can be more probative than a witness's in-court testimony? Indeed, in *United States v. Fisher*, the AFCMR found that an *unavailable* witness' statement was inadmissible because it was not the most probative. Arguably, the proponent could have called other witnesses to testify to the same issue:

> As we read the record there were other witnesses clearly available to the prosecutor. The Government reported at trial that another military member . . . would stand on his Article 31(b) . . . rights. However this representation does not explain why the Government failed to grant immunity. A second witness implicated the accused and seemingly provided all the corroboration needed . . . Nevertheless . . . the prosecution used the document [of the second witness] solely to impeach . . . .[68]

If that case occurs when a witness is unavailable, trying to establish probative value with an available declarant might appear quite difficult.

However, in most cases involving the use of residual hearsay—intrafamily abuse cases—distinguishing the circumstances from *Fisher* should be relatively simple. In these cases, the alleged crime most likely has no other witnesses than the alleged victim. The statement, therefore, is not just direct evidence, but most likely the *only* direct evidence available. Consequently, it should be considered more probative than any expert or circumstantial evidence.[69] Additionally, as the COMA stated in *United States v. Lemere*, situations exist when a "declarant's earlier statement may be more probative than his current testimony."[70] The COMA further noted that this is the premise of one of the hearsay provisions, MRE 803(5) (recorded recollection).[71]

In the case of a recanted statement, an argument for admissibility under residual hearsay—under MRE 803(24)—can possibly be made on two grounds. Counsel can use the court's rationale in *United States v. Rousseau*, if the original statement closely approximates a statement against penal interest—MRE 804(b)(3)—except that the witness is available.[72] Counsel also can use the rationale of the ACMR in *United States v. Whalen* and argue that the statement in ques-

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[65] *Id.* at 610.

[66] 33 M.J. 331, 333-34 (C.M.A. 1991).

[67] 35 M.J. 555 (A.C.M.R. 1992).

[68] 28 M.J. 544, 547-48 (A.F.C.M.R. 1989).

[69] *See* Holmes, *supra* note 5, at 66-7.

[70] 22 M.J. 61, 68 (C.M.A. 1986).

[71] *Id.*

[72] 21 M.J. 960, 964 (A.C.M.R. 1986).

tion closely approximates a prior inconsistent statement—MRE 801(d)(1)(A)—except that the prior statement did not occur at a prior judicial proceeding.[73] Counsel should carefully examine the declarant's state of mind at the time of the statement to determine if bias existed. Indeed, this is the one instance when an examination of evidence's probative value actually involves an examination of the factors used in determining trustworthiness: because the same person is saying opposite things, the more truthful statement necessarily will be the more probative.

Trial Factors

Whether Proper Notice Has Been Given that Residual Hearsay Is Going to be Used

In order to admit a statement under MRE 803(24) or 803(b)(5), counsel must give prior notice "to the adverse party sufficiently in advance of the trial or hearing . . . ." and the notice must include "the intention to offer the statement and the particulars of it, including the name and address of the declarant." Notice is important for the residual exception: a competent attorney will be prepared to oppose admission under an enumerated exception. If the statement is to be offered under the residual exception, on the other hand, the opposing counsel cannot be on guard that he or she should argue against its admission.[74] Precedent exists in federal court, however, for using a "flexible" approach and allowing notice to be given immediately before or during trial. If the proponent is relatively innocent of failing to notify due to genuine surprise, or if the opponent has been constructively notified of the use of the evidence and if a continuance is available to cure a failure of notice, then federal courts have allowed this explicit requirement to be relaxed.[75] This is especially true in intrafamily child abuse cases: the accused most likely knows the child who made the statement and may be the reason the child is not testifying and causing the need to resort to the residual exceptions in the first place.[76]

This is a rationale for unforeseen events and not a justification for ignoring the explicit instruction of the rule. What often happens is that counsel prepares to offer a statement under a specific exception not requiring notice and must turn to the residual exceptions after an unfavorable ruling.[77] To avoid a possible issue, counsel should give notice as soon as possible that he or she intends to offer a statement under the provisions of MRE 803(24) or MRE 804(b)(5). In two respective Air Force and ACMR cases, *United States v. Slovacek*, and *United States v. Valdez*—both involving child abuse—the respective courts held that no proper notice was given and these failures were cited as reasons in denying admissibility.[78] Very simply, the written notice with all the information required by MRE 803(24) and 803(b)(5) should be made a part of the record and the date the proponent notified the opposing counsel should be given as well.

Whether a Clear Showing Has Been Made Why the Evidence Is Required

The court in *Huff v. White Motor Corp.* provides the rationale for this factor:

> In reviewing a ruling made in the exercise of the trial court's discretion [the appellate court is] greatly aided when the record contains a statement of the reasons for the ruling [and in the absence of such a ruling] the appellate court has little choice except to attempt to replicate the exercise of discretion that would be made by a trial judge in making the ruling . . . .[79]

In the military courts, two cases have occurred in which the lack of clear reasons in either the offering or the admission of the residual hearsay was a factor in excluding the evidence—*United States v. Giambra*[80] and *United States v. Valdez*[81].

In *Giambra*, the COMA indicated that the failure by the moving party in offering the evidence to establish a clear reason for admitting a residual hearsay statement was a reason for its inadmissibility. In that case, a mother of a rape victim gave a written sworn statement—even though she was not

[73] 15 M.J. 872, 878 (A.C.M.R. 1983).

[74] Rand, *supra* note 18, at 6.

[75] *See* Furtado v. Bishop 604 F.2d 80 (1st Cir. 1980); United States v. Calkins, 906 F.2d 1240, 1245 (8th Cir. 1990); United States v. Panzerdi-Lespier, 918 F.2d 313 (1st Cir. 1990).

[76] *See* Child, *supra* note 5, at 31.

[77] *Id.*

[78] United States v. Slovacek, 21 M.J. 538, 539-40 (A.F.C.M.R. 1985) *aff'd* 24 M.J. 140 (C.M.A. 1986); United State v. Valdez, 35 M.J. 555, 563 (A.C.M.R. 1992).

[79] 609 F.2d 286, 291-92 (7th Cir. 1979).

[80] 33 M.J. 331, 333-34 (1991).

[81] 35 M.J. 555, 565 (A.C.M.R. 1992).

administered an oath—in which she described a conversation she had with her daughter who stated that the accused had touched her and that the accused had made several statements to her implicating himself.[82] The statement was offered and admitted, even though both mother and daughter were available to testify.[83] In reversing, the COMA noted that the government never clearly indicated in its trial brief why it wanted the statement admitted—its relevance is difficult to ascertain when both the mother and daughter were available to testify.[84]

The *Valdez* case illustrates the second proposition: the failure of the trial judge to make any specific findings that the statements admitted had "circumstantial guarantees of trustworthiness."[85] Without any record, the appellate court was placed into the situation described in *Huff*: it was forced to substitute its discretion for that of the trial judge's. In such a case, lacking the factual context of the lower court to make its decision, it is little wonder that the appellate courts would be prone to overturn decisions admitting such evidence.

The solution is simple: because prior notice is a requirement anyway, an attempt to offer statements into evidence under the residual exceptions should be done in an Article 39(a) session prior to trial on the merits.[86] This procedure not only permits notice to the opposing party and to the military judge, it also allows for a factual record to be created. The military judge should make specific findings.[87] The moving party has the responsibility not only to present during the motion a clear and complete reason why the statement should be admitted, but also to ensure that the military judge makes specific findings on the evidence's admissibility, especially stating the factors considered in making the determination.

Objective Factors

Proper notice and a clear showing are, to a great extent, within the control of counsel seeking admission of the statement. The next set of factors—whether the statement was made under oath or sworn to; whether it was handwritten or videotaped; whether it was detailed; whether it took place in a noninterrogatory setting; whether it was taken by a disinterested third party; and whether leading questions were asked—concern the making of the statement itself, and focus on the person to whom the statement was made. By the time the motion is made seeking admission of the statement, much of the issue concerning this set of factors has been resolved, perhaps negatively for the moving party. Counsel, however, should not resign themselves to fate or circumstances. Rather, the importance of this set of factors indicates that counsel must anticipate difficulty and prepare for usage of residual hearsay (without interfering improperly with an investigation). In cases when a strong chance exists that an out-of-court statement may have to be used—that is, sexual or physical abuse cases involving children, or spousal abuse cases—counsel should ensure that interviewers—whether they are law enforcement agents or social workers—know the questioning methods that may help or hinder the case. This requires a good working relationship with the counsel and the local agencies that may take time and effort in developing, but such a cultivated relationship may prevent mishaps later.

Whether the Declarant's Statement Was Taken Under Oath or Sworn

Military courts, in determining admissibility, frequently consider whether or not the statement was taken under oath. This factor is consistent with many federal courts. As one court observed, "It is fundamental to our system of justice 'that men should not be allowed to be convicted on the basis of unsworn testimony.'"[88] A sworn statement is not dispositive—it always is cited as just one of several factors in determining admissibility. Furthermore, what makes a sworn statement compelling should be examined. Two reasons exist: (1) the possibility of sanction—particularly criminal sanction—against one who makes a false sworn statement; and (2) the sacred nature of oath taking itself. Thus, a "subjective" aspect exists—the declarant's state of mind is important because it is important to know whether the declarant understands the presence or absence of an oath. With regard to child witnesses, at least one study shows that most children can provide legally acceptable definitions of "promise" by the age of five.[89] In many cases, however, it is absurd to say that counselors, parents, or other nonlaw enforcement personnel

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[82] *Giambra*, 33 M.J. at 333-34.

[83] *Id.*

[84] *Id.*

[85] *Valdez*, 35 M.J. at 565.

[86] *See* Holmes, *supra* note 5, at 96-7.

[87] *Id.*

[88] United States v. Love, 592 F.2d 1022, 1026 n.9 (6th Cir. 1979) (quoting United States v. Morlang, 531 F.2d 183, 190 (4th Cir. 1975)).

[89] Gina Richardson, *Beyond Vocabulary: Asking Understandable Questions*, THE ADVISOR, vol. 3, No. 2 Spring 1990, at 7 (American Professional Society on the Abuse of Children) (citing I. Saywitz & C. Jaenicke, *Children's Understanding of Legal Terms: A Preliminary Report of Grade Related Trends*, Address at the Biennial Meeting of the Society for Research on Child Development (1987)).

acted improperly in not ensuring the statements they received were sworn; they often are not acting in an investigatory capacity and are unwitting recipients of emotionally highly charged statements. In two recent cases, unsworn statements were admitted and successfully upheld on appeal.

In *United States v. Lyons,* the COMA held that a videotaped statement by a mentally retarded rape victim was properly admitted because of a variety of factors: the questions asked were not overly leading; no evidence of a rehearsed statement existed; no evidence of influence by criminal investigation division (CID) agents or bias existed; and the statement was made under the stress of the event.[90] In *United States v. Fink,* the ACMR held that several unsworn statements made to a school nurse, a psychologist social worker, and a teacher's aide were admissible as well.[91] Therefore, in certain situations, the absence of sworn statements may not be dispositive or even significant. Admissability in these situations was resolved after the fact and it is better to be cautious. A statement always should be sworn when possible, especially if the declarant is an adult who can understand oath-taking and always, if the statement is taken by a law enforcement official.

Whether the Statement Was Written in the Witness's Own Hand, by Someone Else, or Videotaped

In cases involving a typed sworn statement, determining where the questioner "ends" and where the declarant "begins" is often difficult. These statements often are summaries of interviews conducted by investigators that have been reduced to typewritten form and then looked at—sometimes cursorily—by the persons questioned. In ruling inadmissible a statement as residual hearsay, the COMA in *United States v. Barror* said, "While we know that the statement exists, that it was sworn to and signed, and that it came into being early in the chronology of events, the record reveals virtually nothing of the dynamics of the interview/interrogation process or the state of mind of the declarant."[92]

A handwritten statement allows more of the declarant's state of mind—as opposed to the interviewer's—to be revealed. If the statement is in the declarant's handwriting, it is not a summation of events by the interviewer and is most likely to be a recollection of what happened in the declarant's own words. In two recent cases, *United States v. Ortiz* and *United States v. Bridges*, the AFCMR cited, as one of several reasons for admitting a statement under MRE 803(24), that the declarant's statement was handwritten.[93] The dynamics of how a handwritten statement was taken also should be examined. A handwritten statement rarely is the first product of an interview and almost always comes after an oral statement. Thus, as the AFCMR stated in *United States v. Hansen*, the sooner the declarant converts the statement into a handwritten one and signs it under oath, the better.[94]

All three of the above cases involved adults, and while it is certainly better for adult witnesses in cases potentially involving residual hearsay to give handwritten statements than have statements written for them, in many cases it is not realistic for children to do so. The solution, then, is undoubtedly the videotaped interview. A strong argument against the admissibility of hearsay is that it is hard to uncover misrepresentation or fabrication, particularly if one offers a statement as a proxy for the original declarant or if the statement is written. A videotape allows, to a much greater degree, the "dynamics" described in *Barror* to be revealed. It captures body language and facial expressions and can reduce the number of interviews by allowing agency representatives to view the videotape rather than reinterviewing a child.[95]

Videotaped statements can be divided into litigative statements (taken with the intention of being used as testimony) and investigative statements (taken by a government agent as part of a criminal investigation).[96] Important distinctions are present in the two types of statements: a litigative videotape most likely will be in the form of a deposition and have an opposing counsel cross-examining the witness. The litigative videotape is a deliberately chosen option by a counsel, usually done to avoid having the witness—generally, a child—face an alleged assailant. The litigative videotape is not considered hearsay at all, but rather a statement taken at a hearing. The analysis for the admissibility of such a statement falls under the Supreme Court's guidelines set forth in *Coy v. Iowa* and *Maryland v. Craig.*[97]

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[90] United States v. Lyons, 36 M.J. 183 (C.M.A. 1992).

[91] 32 M.J. 987, 990-93 (A.C.M.R. 1991). Importantly, in *Fink*, no one who heard the statements was a law enforcement official. Courts view any so-called "station house statements" with skepticism, and most likely would look even more skeptically at an unsworn statement made to a law enforcement official.

[92] 23 M.J. 370, 373 (C.M.A. 1987).

[93] United States v. Ortiz, 34 M.J. 831, 835 (A.F.C.M.R. 1992); United States v. Bridges, 24 M.J. 915, 917 (A.F.C.M.R. 1987).

[94] United States v. Hansen, 36 M.J. 599, 605 (A.F.C.M.R. 1992).

[95] WHEN THE VICTIM IS A CHILD, *supra* note 45, at 40.

[96] Juba, *The Admissibility of Videotaped Testimony at Courts-Martial,* ARMY LAW., May 1991, at 21, 22.

[97] 487 U.S. 1012 (1988); 110 S. Ct. 3157 (1990).

An investigative videotape, on the other hand, is one whose use at trial has come about because of some contingent, unwanted (though not necessarily unforeseen) occurrence (usually because the witness is not available to testify). The statement is most likely hearsay and the *Idaho v. Wright* analysis would be applied in such a case. Do not combine the two types, because each has its own standards. The proper analysis must be used: to join the two rationales as one will hinder the chances of admissibility of an appropriately conducted interview of either type. Although the litigative videotape has the advantage of having the witness cross-examined under oath, it has a partisan goal as well: the questions by the moving counsel are meant to show the witness in the best possible light, and the witness undoubtedly has "practiced." Because an investigative videotape *is* investigatory, such factors necessarily would detract from it.

Videotaped interviews are not foolproof. Nothing prevents careful rehearsal or preparation to eliminate statements that could impugn a child's credibility, although in some cases, technology may enhance a child's effectiveness as a witness.[98] Another question that undoubtedly will be raised is which interview of a child has been videotaped. The general practice is to videotape only the first interview, but a child rarely divulges a complete story all at once. One suggestion is to videotape all interviews with a child. This may avoid the argument that a child was "coached" at a previous interview or that only the "best" interview was videotaped.[99]

Whether the Statement Is Detailed

Intuitively, a detailed statement can be seen as more reliable than one short on details. Great detail in statements makes one hesitate to believe that the statement is all a work of imagination or fabrication. In *United States v. Ortiz*—a case involving an adult declarant—and *United States v. Fink*—a case involving a child declarant—the courts, in allowing admission, cited as a factor that the declarants' statements were greatly detailed.[100] When the *Idaho v. Wright* unavailability standard applies, however, a detailed statement has limited value—its detail makes it less likely that the declarant is providing false information. If counsel were to use the details to refer to past events or to past evidence in the case, he or she would be doing precisely what *Idaho v. Wright* prohibits—referring to events not immediately surrounding the statement. The counsel opposing admission should be particularly aware of this and should ensure no "bootstrapping" of external evidence is brought in by using this factor as a reason for admissibility.

Whether the Taking of the Statement Occurred in a Noninterrogatory Setting

Courts view "station house statements" with skepticism. Courts fear that declarants are currying favor by demonstrating that they can help convict defendants in exchange for favored treatment or that they are being pressured to say things against their will.[101] The declarants may feel they are not free to leave until they say what the interviewers or interrogators want them to say. Because of these pressures, military courts have cited the use of noninterrogative settings in taking interviews as a factor in allowing the admissibility of residual hearsay statements. In *United States v. Bridges,* a woman wrote a statement in her own dining room; likewise in *United States v. Ortiz,* the declarant prepared the handwritten statement away from the interrogative setting.[102]

As part of proactive dealings with law enforcement officials and social workers, counsel should ensure that such persons are sensitive to this factor. Not only is it sound from an investigatory standpoint to conduct certain types of interviews—especially those dealing with children and traumatized victims—in nonhostile, nonintimidating environments, it can have a positive impact at trial.

Whether the Statement Was Made to a Disinterested Third Party

The court in *Ortiz* said that the "Government must prove that statements are not the product of subtle biases introduced by the interviewer or the questioning technique."[103] Ideally, an investigator is not on any side when investigating a case, but simply is attempting to find out what happened. As the COMA in *United States v. Guaglione* said, however, the reality is that investigators often are not "simply observing and evaluating but are seeking to build a case to prove guilt."[104] Consequently, statements made to investigators are inherently more suspect and the courts have scrutinized them carefully.

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[98] Misener, *supra* note 22, at 379.

[99] WHEN THE VICTIM IS A CHILD, *supra* note 45, at 41.

[100] 34 M.J. 831, 835 (A.F.C.M.R. 1992); 32 M.J. 987, 993 (A.C.M.R. 1991).

[101] Mueller, *supra* note 8, at 390.

[102] 24 M.J. 915, 917 (A.F.C.M.R. 1987); 34 M.J. 831, 835 (A.F.C.M.R. 1992).

[103] *Ortiz,* 34 M.J. at 835.

[104] 27 M.J. 268, 274 (C.M.A. 1989) (quoting United States v. Cordero, 22 M.J. 216, 223 (C.M.A. 1986)).

While a totally disinterested third party probably does not exist, *how* the interview is conducted is more important than *who* conducts it. For example, in *United States v. Hansen,* the statement was found trustworthy because the investigators' source of details was solely from the witness.[105] Additionally, another witness always should be present during a critical witness interview, and the second person also should take thorough notes. This is one reason why a videotaped interview is so helpful: one can see and hear the responses of not only the declarant but the interviewer as well.

Whether Leading Questions Were Asked

Psychological data suggests that children may alter factual accounts in response to cues from questions, especially from adult questioners.[106] The effect of such questioning is magnified when children are interviewed repeatedly by several different adults.[107] Additionally, before a certain age, children may have difficulty distinguishing memories of things that actually occurred and things that they only imagined occurred.[108] Some studies also have shown that children are more likely to accept an interviewer's suggestions in certain situations—when they are younger, feel intimidated by the interviewer, are interviewed after a long delay, when more than one interviewer makes the same suggestions, or when the interviewer's suggestions are strongly stated and frequently repeated.[109] Because of these reasons, leading questions are thought to be dangerous when dealing with children who are alleged victims. Consequently, courts scrutinize any out-of-court statement that is the result of an interview to determine whether or not questions were asked which might suggest the answer.

Simply to say that leading questions should never be asked, however, is too simplistic an answer to a complex situation. In addition to the data mentioned above, studies indicate that while the use of leading questions may risk children providing false information, risks also exist that emotionally charged information may not be revealed if leading questions are not used.[110] Furthermore, as two clinicians have said:

> In the best of all possible worlds, it would be advisable not to ask children leading questions . . . . But in the best of all possible worlds, children are not sexually assaulted in secrecy, and then bribed, threatened, or intimidated not to talk about it. In the real world, where such things do happen, leading questions may sometimes be necessary . . . .[111]

Indeed, leading questions frequently are used in court to aid children who are alleged victims of sexual abuse.[112] In the investigative context, particularly when it comes to offering an out-of-court statement, use of leading questions becomes more problematic. But it would be reductive to find that a statement in such a situation is untrustworthy simply because leading questions were asked. Instead, one commentator has suggested viewing questions used in interviewing children alleged to have been abused on a continuum. The commentator breaks down the types of questions into five, as follows:

Type	*Question*
General	How are you?
Focused	How do you get along with your dad?
Multiple Choice	Did this happen in daytime or nighttime?
Yes-No	Did he tell you not to tell?
Leading	He took your clothes off, didn't he?[113]

This is a good guide in evaluating how trustworthy, from an evidentiary standpoint, questions and responses are. The

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[105] 36 M.J. 599, 605 (A.F.C.M.R. 1992).

[106] Powell & Langwick, *Children as Observers and Witnesses: the Empirical Data,* FAM. L. Q. 416, 417 (1989).

[107] Misener, *supra* note 22, at 372 (citing Marcia K. Johnson & Mary Ann Foley, *Differentiating Fact from Fantasy: the Reliability of Childrens' Memory,* 40 J. OF SOCIAL ISSUES 33, 42-3 (1984)).

[108] WHEN THE VICTIM IS A CHILD, *supra* note 45, at 37.

[109] Jon R. Conte, *Can Children Provide Accurate Eyewitness Reports?* VIOLENCE UPDATE, Sept. 1990, at 1-4 (citing K. Saywitz, G.S. Goodman, E. Nicholis, & S. Moaro, Childrens' Memories of Genital Examinations: Implications for Cases of Child Sexual Assault from Can Children Provide Accurate Eyewitness Testimony?, Symposium presented at the Society for Research in Child Development Meetings (1989).

[110] *Id.* at 36-7 (quoting K. MACFARLANE ET. AL., SEXUAL ABUSE OF YOUNG CHILDREN 74-75 (Guilford Press 1986).

[111] WHEN THE VICTIM IS A CHILD, *supra* note 45, at 39.

[112] Kathleen C. Fuller, *Types of Questions for Children Alleged to Have Been Sexually Abused,* THE ADVISOR (American Professional Society on the Abuse of Children), vol. 3, no. 2, Spring 1990, at 5.

[113] *Id.* at 4.

entire interview should be examined and the questions placed on a continuum such as the one above. The more open-ended type of questions—general, focused, and multiple choice—tend to inspire more confidence in their reliability, while the close-ended type of questions—yes-no, leading—tend to inspire less confidence. A leading question is not unreliable per se, but certainly less reliable than the other types. The content of the questions and their placement in the interview should be examined as well. As the same commentator who created the above chart said:

> [I]n forming conclusions based upon interview data, the greater the proportion of close-ended questions, the less confidence the evaluator may place on the information elicited from the child. Nevertheless, evaluators need to appreciate that children may provide very accurate accounts in response to leading questions, and that in some cases, especially with young children, directive, and at time leading, questions are necessary.[114]

The same advice can apply in a judicial proceeding.

In allowing residual hearsay statements in the cases of *United States v. Lyons* and *United States v. Stivers,* the ACMR favorably viewed the absence of suggestive or leading questions or any indication the interview was rehearsed.[115] In the *Lyons* interview, the interview/reenactment of the alleged crime was videotaped.[116] Unless the interview is videotaped, or closely observed by another witness, no way exists to know—apart from the testimony of the interviewer—whether leading questions were asked.

Subjective Factors

The last three factors focus on the declarant's availability and state of mind. Counsel seeking admission of the statement have the least amount of control over these last factors.

Whether the Declarant Is Available or Whether His or Her Unavailability Has Been Clearly Established

In reading the two rules, availability is not an explicit requirement: MRE 803 evidence can be used whether or not the witness is available. Military Rule of Evidence 803(24)(B) also states that the evidence which the proponent wants used must be more probative than any other "which the proponent can secure through reasonable efforts," arguably implying that some sort of availability or unavailability must be established. It would appear as if the United States Supreme Court has made this a constitutional necessity for admission of residual hearsay. In *Idaho v. Wright*, the Court stated that although on its face admission of hearsay evidence might be thought to violate the literal terms of the Confrontation Clause, admission of such evidence is not prohibited.[117] In admitting hearsay statements under certain conditions, however, it relied on a previous case, *Ohio v. Roberts,* which states, "First in conformance with the Framers' preference for face-to-face accusation, the Sixth Amendment established a rule of necessity. In the usual case . . . the Prosecutor must produce or demonstrate the unavailability of the declarant whose statement it wishes to use against the declarant."[118] In stating this proposition, the Court in *Roberts* excepted "firmly rooted unavailability."[119] Because the residual, or catch-all, hearsay exception in *Wright* was not "firmly rooted," such a demonstration was required.[120] In *Wright*, the alleged victim was found incapable of communicating to the jury and the defense counsel agreed that the alleged victim would be considered "unavailable." Therefore, the condition was satisfied.[121]

Because such a demonstration apparently would be required if the declarant is not to appear, the definition of "unavailability" should be examined. In *Ohio v. Roberts*, the Supreme Court defined unavailability as occurring when "the prosecutorial authorities have made a *good faith effort* to obtain [the witness's] presence at trial."[122] The Court went on to say, "The law does not require a futile act . . . But if there is a possibility, albeit remote, that affirmative measures might produce the declarant, the obligation of good faith may demand their effectuation . . . ."[123] In *Roberts*, the prosecutor issued a

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[114] *Id.*

[115] United States v. Lyons, 33 M.J. 543, 546-48 (A.C.M.R. 1991); United States v. Stivers 33 M.J. 715, 719 (A.C.M.R. 1991).

[116] *Lyons,* 33 M.J. at 546.

[117] 110 S. Ct. 3139, 3145 (1990); *see also* Bourjaily v. United States, 107 S. Ct. 2775, 2782 (1987).

[118] 100 S. Ct. 2531, 2538 (1980).

[119] *Id.*

[120] 110 S. Ct. at 3147.

[121] *Id.*

[122] 100 S. Ct. at 2543 (quoting Barber v. Page, 390 88 S. Ct. 1322) (emphasis added).

[123] *Id.* at 2543.

subpoena to a witness at her parents' home five times and also questioned her parents—who had not been able to locate her for over a year—as to her whereabouts. The Supreme Court was satisfied that the "unavailability" burden—which is the prosecutor's—had been met.[124] To give an example of a failure to attain the standard, the Court contrasted the prosecutor's efforts in *Roberts* to the efforts put forth *Barber v. Page.* In that case, the Court held that the prosecutor failed to make any good faith effort to secure a federal penitentiary inmate who was incarcerated in a nearby state and whose location was known.[125]

Turning to the military courts, MRE 804(a) defines unavailability.[126] This definition, and the Supreme Court's definition in *Roberts,* highlight what has been previously discussed in this article: the lack of identity between the Confrontation Clause and the hearsay rules. Indeed, a witness can be available within the meaning of the Confrontation Clause but still unavailable for purposes of the rule.[127]

Accordingly, the first area to examine, and the simplest to define, is the witness who does not physically appear in court to testify—the unavailability stated in MRE 804(a)(6). To demonstrate that the witness is unavailable, counsel should exhaust the means at their disposal to compel the witness to appear.[128] If the witness is a civilian within the United States, the power exists to issue a subpoena under UCMJ Article 46 and RCM 703(e)(2) or RCM 703(e)(1)—if the witness is a military member. If the civilian witness refuses to comply with the subpoena, the counsel should have a United States District Court compel attendance or have a warrant of attachment issued by the military judge under the provisions of RCM 703(e)(2)(g).

Military case law establishes the parameters for reasonable and good faith efforts for a government counsel in ensuring that a witness will appear. In *United States v. Burns,*[129] the COMA held that a failure to personally serve a subpoena on a critical witness and the failure to check all possible addresses and leads indicated the requirements were *not* met. The COMA further stated that "a witness is not 'unavailable' unless the government has exhausted every reasonable means to secure his live testimony."[130] The COMA also specifically indicated what this meant: military orders for service personnel, a served subpoena for a civilian witness, and then, if the witness still refuses to appear, either criminal prosecution under Article 47 of the UCMJ or compulsion to appear by a warrant of attachment.[131]

A more difficult problem is the situation envisioned in MRE 804(a)(2)—the witness who is physically available to testify, but will not do so. In *United States v. Hines,* neither of the two alleged victims in a sexual abuse case nor their mother would testify, and stated they would go to jail rather than do so.[132] The COMA held that the military judge properly had determined that the witnesses were unavailable, even though he did not, as he might have, "institute formal legal proceed-

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[124] *Id.* at 2544.

[125] *Id.* at 2543-44.

[126] Under MRE 804(a), a witness is unavailable if he or she:

> (1) is exempted by ruling of the military judge on the ground of privilege from testifying concerning the subject matter of the declarant's statement; or
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> (2) persists in refusing to testify concerning the subject matter of the declarant's statement despite an order of the military judge to do so; or
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> (3) testifies to a lack of memory of the subject matter of the declarant's statement; or
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> (4) is unable to be present or to testify at the hearing because of death or then-existing physical or mental illness or infirmity; or
>
> (5) is absent from the hearing and the proponent of the declarant's statement has been unable to procure the declarant's attendance (or in the case of a hearsay exception under subdivision (b)(2), (3), or (4), the declarant's attendance or testimony) by process or other reasonable means; or
>
> (6) is unavailable within the meaning of Article 49(d)(2).

MCM, *supra* note 1, MIL. R. EVID. 804(a).

[127] See United States v. Martindale, 36 M.J. 870, 877 (N.M.C.M.R. 1993).

[128] See United States v. Hubbard, 18 M.J. 678 (A.C.M.R. 1984); United States v. Thorton, 16 M.J. 1011 (A.C.M.R. 1983); United States v. Griffin, 21 M.J. 501 (A.F.C.M.R. 1985).

[129] 27 M.J. 92, 96 (C.M.A. 1988).

[130] *Id.* at 97.

[131] *Id.*

[132] 23 M.J. 125, 133 (C.M.A. 1986).

ings against the witnesses in order to force them to testify." The COMA stated, "Given their apparent determination and their close relationship with the appellant, we think the judge was justified here in taking the witnesses at their word."[133] In such a case, an Article 39(a) session should be requested by the counsel who had intended to use the witnesses and they should be questioned under oath to examine their relationship to the accused and the sincerity of their refusal. If the declarant is not a family member or the refusal lacking in sincerity or determination, the judge likely will not exhaust "all reasonable means" at his or her disposal unless the judge resorts to the possible criminal sanction.

A final situation to be examined involves the witness who, because of danger of severe psychological injury, should not testify. Such a case should not be confused with a child who testifies in some form without facing the accused. In the latter situation, the statement offered is not hearsay and instead the *Coy v. Iowa* and *Maryland v. Craig* analyses are relevant. In the former situation, the child does not testify in any hearing at all due to possible psychological injury. Assessing such unavailability is difficult. In *Warren v. United States*, the Court of Appeals for the District of Columbia suggested four factors to determine if a person would be psychologically unavailable: probability of psychological injury as a result of testifying; degree of anticipated injury; duration of the injury; and whether the expected psychological injury is substantially greater than the reaction of the average victim of rape, kidnapping, or terrorist act.[134]

These factors are hard to discern and counsel, to establish unavailability, must do more than simply make a general plea of admission: counsel must establish *why* calling the witness is dangerous. Furthermore, the proponent probably will have to show that no other "reasonable efforts" exist through which this evidence can be obtained. Other efforts might be an in camera hearing without the presence of attorneys, a videotaped deposition in lieu of live testimony, having the child testify by two-way cameras or via television, or using a screen to keep the child from seeing the accused.[135] Only after showing that none of these is possible as an alternative can a proponent then move to the question of the hearsay statement itself. One military judge has suggested accomplishing this by a stipulation of fact. Alternatively, he has suggested calling the witness so the judge can discern the witness's demeanor, or calling other disinterested witnesses—presumably an expert among them—who can testify about the condition of the witness.[136] Reliance on medical reports—particularly hearsay evidence—likely will not be enough. As the NMCMR stated in *United States v. Harjak:*

> Notwithstanding the military judge's empathetic recitation of the hideous occurrences of the victim's young life, and his desire for the court-martial not to endanger her mental and physical health, [the unauthenticated medical reports of the victim] were hearsay and irrelevant to the victim's current mental and physical status. Furthermore, even if they had been properly admitted, the reports did not establish that the victim's face-to-face confrontation with appellant would cause her to suffer mental or physical harm.[137]

If a Child Was the Declarant, Whether the Statement Was Beyond the Range of the Child's Experience

In *Idaho v. Wright,* whether statements the alleged victim made were of the type that one normally would expect a child to make was one of two factors that related to circumstances surrounding the making of the statement.[138] Following *Idaho v. Wright,* the COMA, in *United States v. Clark,* found that the alleged victim related things beyond the ken of a five-year-old as a factor in admitting the statement.[139] The focus is not necessarily on any advanced terminology, but on the described acts themselves. For example, in *Clark,* a witness testified that the alleged victim said:

> [H]er father was going to take her to get some toys . . . that he took her to a cornfield. Once they got to the field . . . she said he touched her on the bottom, she indicated her genital area; she said that her daddy put some cream stuff on her bottom and then put the thing between his legs in her bottom.[140]

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[133] *Id.*

[134] 436 A.2d 821 (D.C. Ct. App. 1981).

[135] Nancy Schleifer, *Might Versus Fright: The Confrontation Clause and the Search for "Truth" in the Child Abuse Family Court Case,* 16 NOVA L. REV. 788-89 (1992).

[136] Clervi, *supra* note 5, at 51.

[137] 33 M.J. 577, 581 (N.M.C.M.R. 1991).

[138] 110 S. Ct. 3139, 3152 (1990).

[139] 35 M.J. 98, 106 (C.M.A. 1992).

[140] *Id.* at 100.

Arguably, the older a child becomes, the more possible it is that a statement describing sexual acts will fall within that child's range of experience. Employing this factor potentially may result in opposing counsel examining the sexual past of the alleged victim if that victim is an older child. Consequently, MRE 412—the "rape shield" rule—may be raised.[141] What should be remembered, however, is that during the argument for admission of a residual hearsay statement, the military judge is not bound by MRE 412. Military Rule of Evidence 412 applies "*Notwithstanding* any other provision of these rules . . ."[142] In that case, MRE 104 controls, which asserts that a judge is only bound by rules of privilege when determining the admissibility of evidence.[143] The moving counsel should be aware of this when making an argument for admissibility; no evidentiary protection for the witness exists beyond the judge's discretion.

Whether the Declarant's State of Mind Indicates Reliability

The last factor concerns the declarant's state of mind—the most subjective, and in many ways, the most difficult factor to assess. The difficulty results from the current delimitation imposed by *Idaho v. Wright.* Certain factors have been explicitly rejected by military courts following *Wright.* In *United States v. Harjak,* the NMCMR rejected the use of several factors delineated by the lower court judge in his findings "since they do not bear upon the circumstances surrounding the rendition of the victim's statements or are not supported by the record."[144] Although it is not clear in *Harjak* which of these factors did not bear on the circumstances surrounding the rendition of the victim's statements, most probably the use of evidence to indicate that the alleged victim did not recant her statements and never refused to testify concerning the alleged offenses would both be so considered.[145] Likewise, in *United States v. Miller,* the same court found that evidence indicating that a declarant's statement was consistent with an excited utterance she had made and that it was "fresh on the heels of the excited utterance" could not be considered.[146]

Furthermore, the Criminal Law Division of the Office of The Judge Advocate General, in its 1990 message on residual hearsay following *Idaho v. Wright,* listed three factors that can be used in determining whether a statement can be admitted under the residual exception: spontaneity, consistent repetition, and "in some circumstances, change of behavior" of the declarant.[147] Not only do all three of these relate to the declarant's state of mind at the time the statement is uttered, they are words that similarly can be employed in invoking the MRE 803(2) excited utterance exception. Thus, in stating that these factors can be used, the Criminal Law Division apparently rejects what hearsay specialists call the "near miss" theory of residual hearsay. This theory holds that the residual exception "cannot be invoked as the basis for the admissibility of evidence which is generally of a type covered by another hearsay exception . . ."[148] whereas all three of these factors closely approximate excited utterance criteria.

These factors relate to the statement itself and are not like *Miller*'s inadmissible criteria, which refer to a previous excited utterance. After *Idaho v. Wright,* the military courts have endorsed the use of these factors to admit statements which, because of different reasons, do not fit neatly into the MRE 803(2) exception. In *United States v. Fink*—in response to an innocuous question by a teacher's aide—an alleged victim "blurted out" that she was not supposed to talk about what happened at home and that she knew teachers and others were talking about her sexual acts at home.[149] These statements closely approximate excited utterances: the alleged victim became very excited and visibly upset, even though the events took place a considerable time from the statements and the statements were made in response to questions.[150] Similarly, in *United States v. Clark,* even though the baby-sitter asked the victim whether her father had done anything to her, the COMA upheld the victim's subsequent statement that he had sexually molested her as admissible.[151] The COMA upheld the lower court's finding that the statements were "voluntary, unintentional, unconstrained, and spontaneous" and because

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[141] MCM, *supra* note 1, MIL. R. EVID. 412.

[142] *Id.* (emphasis added).

[143] *Id.* MIL. R. EVID. 104.

[144] 33 M.J. 577, 582 (N.M.C.M.R. 1991).

[145] *Id.*

[146] 32 M.J. 841, 851 (N.M.C.M.R. 1991).

[147] Message, Dep't of Army, *supra* note 46.

[148] Zenith Radio Corp. v. Mashita Elecs. Indus. Co., 505 F. Supp. 1190, 1262-63 (E.D. Penn. 1980). For a discussion of the "near miss" theory, see Thomas Black, *F.R.E. 803 (24) and 804 (b)(5)—The Residual Exceptions: An Overview,* 25 HOUSTON L. REV. 13, 26-7 (1988).

[149] 32 M.J. 987, 992 (A.C.M.R. 1991).

[150] *Id.*

[151] 35 M.J. 98, 106 (C.M.A. 1992).

the event had occurred only hours before the statements were made, she still was under the trauma of the event.[152] Likewise, in *United States v. Lyons,* the COMA listed as a factor in admitting a videotape by a deaf-mute mentally retarded declarant, who was an alleged rape victim, that she was "emotionally and excitedly volunteering information rather than calmly answering questions."[153]

This "excited state of mind" is cited as one factor in determining admissibility in both *Clark* and *Lyons.* Furthermore, no sharp boundary dividing what would qualify under MRE 803(2) and 803(24) is provided. Presumably, if a statement does not meet the exact definition of MRE 803(2), then as a "near miss," the factors indicating the utterance was excited could be employed in asking for admission under MRE 803(24).

Alternative Theories of Admissibility

An analysis of the case law reveals that admission under the residual hearsay rule—especially if the declarant is unavailable—may be difficult. Counsel, therefore, should not rely solely on the residual hearsay exception as an avenue of admission. Rather, counsel carefully should scan the statement that they wish to have admitted and determine whether the statement—or even parts of the statement—might fall under an alternative exception or be considered hearsay at all. A significant advantage exists to finding another exception to admissibility. Most importantly, if the exception is "firmly rooted" then the question of a witness's unavailability becomes moot.[154] In *United States v. Arnold,* the COMA held that a statement admitted as an "excited utterance" under MRE 803(2) had sufficient indicia of reliability and a showing of unavailability, therefore, was not required.[155] Likewise, in *United States v. Lingle,* the COMA stated that the "state of mind" exception under MRE 803(3) was "firmly rooted"; therefore, unavailability need not be demonstrated.[156] The criteria for admissibility for the excited utterance exception is set forth in *Arnold:* the statement must be spontaneous, excited, or impulsive; the event must be startling; and the declarant must be under the stress of the event.[157] The COMA has allowed a time lapse between the startling event and the spontaneous utterance: eighteen hours in *United States v. Miller,* and twelve hours in *Arnold*[158]. In *Miller,* the statement was offered to a girlfriend. In *Arnold,* the statement was offered to a school counselor. It appears less likely that counsel would successfully move to admit a statement if it were given to a law enforcement agent. Even in that eventuality, however, if the declarant were under the stress of the event that had occurred shortly beforehand, the statement might be successfully admitted.[159]

In the same way, counsel should look very carefully at the statements that they are trying to admit and determine whether any statements might involve the declarant's existing mental or physical condition—the exception under MRE 803(3). The standard is that the statement must be of a current condition and not refer to a previous event.[160] Importantly, a child may have a greater time span in reporting a "mental condition" and the statement may be prompted by adults.[161] Lastly, counsel should look to whom the statement was made, for it may qualify as admissible under MRE 803(4), a statement made for the purpose of medical diagnosis or treatment. The Supreme Court has recognized that in seeking medical help, the declarant has an interest in giving accurate information, therefore, it is a firmly rooted exception and unavailability need not be demonstrated.[162] In presenting the alternative theory, it should be remembered that certain statements that fall under an alternative exception—MRE 803(2) and (3) for example—may preface or be embedded in a complete statement counsel is trying to admit under the residual hearsay exception. For example: a woman is told by CID agents that her fiance is HIV positive. She immediately becomes distraught and makes statements such as "Why didn't he tell me?" and "I am going to stop seeing him and get HIV tested." She is then questioned and gives a sworn statement indicating that she did not know he was HIV positive. At trial she recants her statement. The previous sworn statement only can be offered sub-

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[152] *Id.*

[153] 36 M.J. 183, 184 (C.M.A. 1992).

[154] White v. Illinois, 112 S. Ct. 736, 738 (1992).

[155] 25 M.J. 129, 133 (C.M.A. 1987).

[156] 27 M.J. 704, 708 (A.F.C.M.R. 1988).

[157] *Arnold,* 25 M.J. at 132; United States v. Miller 32 M.J. 841, 851 (N.M.C.M.R. 1991).

[158] See United States v. Palacios, 32 M.J. 1047, 1053 (A.C.M.R. 1992); "The military judge admitted the child's statements to the mother and *to MPI Gruber,* made immediately after the incident . . . as excited utterances under Military Rule of Evidence 803(2). We agree with the military judge's determination that these statements qualify as excited utterances." (emphasis added).

[159] *See* Memorandum, Trial Counsel Assistance Program, Evidentiary Foundations: Mil. R. Evid. 803(3): The Exception for State of Mind of Then Existing Condition (April 1992).

[160] *See* United States v. Shepherd, 34 M.J. 583, 590 (A.C.M.R. 1992); United States v. Elmore, 33 M.J. 387, 396 (C.M.A. 1991).

[161] White v. Illinois, 112 S. Ct. 736, 743 (1992); *see also* Brinks, *Military Rule of Evidence 803(4): The Medical Treatment Hearsay Exception and Trial Practice,* ARMY LAW., Jan. 1993, at 30.

[162] 709 P.2d 1191-92.

stantively as residual hearsay. However, the two statements, "Why didn't he tell me?" and "I am going to stop seeing him and get HIV tested" can be offered substantively under MRE 803(2) and (3) respectively as evidence that she did not know her fiance was HIV positive. This example illustrates the need for counsel to carefully review each statement and the context in which the statement was made. Even if a statement as a whole does not meet the standards imposed under the residual hearsay exception, other statements within the larger one may be admitted alternatively.

Finally, a proponent must remember that hearsay is evidence offered for truth, and that the statement counsel is trying to admit may not be hearsay at all. In *In re Dependency of Penelope B.*, the Washington appellate court pointed out that the child's act of running, screaming, or crying out "I hate you," when the accused's name was mentioned or when he walked into the room was not considered hearsay.[163] In addition, as previously discussed, are the child's statements of sexual acts—these plausibly could be considered nonhearsay, because they are not necessarily introduced to show whether certain acts occurred but that the child's knowledge of them is inappropriate.

Conclusion

Counsel should understand that certain witnesses will recant or become unavailable, particularly alleged victims in intimate familial crimes.[164] In such cases, counsel should become involved in the case as soon as possible and work closely with the law enforcement agents in helping them interview the witness. Lastly, counsel should be prepared to argue for admission under residual hearsay and on alternative grounds as well, and all such arguments should take place in a motion in limine prior to trial on the merits.

[163] Schleifer cites that in one review of 630 cases of alleged sexual abuse, recantation occurred in 22% of the cases. Schleifer, *supra* note 135, at 787 (citing Margaret Reiser, *Recantation in Child Sexual Abuse Cases*, CHILD WELFARE, Nov.-Dec. 1991, at 6).

[164] Arguing for admission of residual hearsay is usually thought of as a prosecutorial function, and the overwhelming majority of cases on the subject deal with the government's attempts to admit, and defense counsel's efforts to exclude, residual hearsay. In a recent case, however, United States v. Burks, 36 M.J. 447 (C.M.A. 1993), the COMA dealt with an unsuccessful attempt by defense counsel to admit hearsay under MRE 803(24) and 804(b)(5). In such a case, the constitutional issues of due process are raised to an even higher degree. For a discussion of these issues, see *Burks*, at 448-51.

A Primer on Contractor Environmental Remediation and Compliance Costs*

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"I do not believe it is fair to require contractors to absorb the costs of environmental cleanup if the performance of government contracts contributed to the pollution and if the contractor complied with environmental laws and regulations." —Eleanor R. Spector, Deputy Assistant Secretary of Defense for Procurement

"[A] contractor may . . . treat allocable portions of CERCLA cleanup costs as 'ordinary and necessary business overhead' expenses, which would be reimbursable if otherwise 'allowable' under federal procurement regulations."—James F. Hinchman, General Counsel, General Accounting Office

"The Pentagon has ignored a massive liability, and is allowing its contractors to charge the American taxpayers for the costs of cleaning up environmental messes at defense plants across the country . . . no one can even guess how many billions will be in the real bill."—Representative John Conyers, Jr., Chairman, House Government Operations Committee

Introduction

The Department of Defense's (DOD) effort to comply with environmental standards and clean up contamination from past activities is approaching epic proportions. The fiscal year (FY) 1992 DOD appropriation for cleanup alone was $1,183,900,000.[1] The House of Representatives added over one billion dollars to that amount in a supplemental appropria-

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[1] H. Rep. No. 627, 102d Cong., 2d Sess. 70 (1992).

tion to bring the total for the DOD environmental compliance and restoration programs near $3.7 billion for FY 1992.[2] The FY 1993 appropriation for all DOD environmental programs is $3.93 billion.[3] The Congressional Budget Office recently stated "the government may have to spend hundreds of billions of dollars in the next 30 years to clean up hazardous waste at military bases, Energy Department installations, and other federal facilities."[4]

These startling figures likely understate the true costs involved. The Congressional Budget Office found cleanup cost estimates for sites on installations included in the first round of base realignment and closure increased about fifty percent since February 1991.[5] Furthermore, the full extent of contaminated sites may not yet be known. Additional sites can appear after initial assessments are made and some types of contamination are difficult to detect.[6]

Notwithstanding the cost, Congress, Office of the Secretary of Defense, and the military departments are committed to environmental compliance and the effective remediation of past federal facilities as quickly as funding allows.[7] Federal facility compliance with environmental laws and the need for a clean environment are principles that have gained universal acceptance.

That the DOD—and therefore the taxpayer—pays the bill for the cost of current environmental compliance and for the remediation of past contamination,[8] is logical and has provoked relatively little controversy.[9] Alternatively, the question of whether the DOD or the taxpayer should pay for the compliance and cleanup costs of DOD contractors is a highly controversial[10] and complex issue.

Proponents of a policy allowing contractors to recover such costs argue that these costs are the price of responsible corporate citizenship and are costs that arise in the ordinary course of business. Government contractors, they argue, should be able to pass these costs to their customer—the government—just like any other business. Opponents are concerned about the policy because the cost of remediating past contractor contamination is being passed quietly to the taxpayer. The Superfund liability scheme makes polluters responsible for cleanup, but government contractors could be able to duck their responsibility at the expense of the taxpayers. Further, no one has yet identified the costs associated with the program and determined how such extraordinary expenditures can be handled in a period of declining resources. Because of the extraordinary nature and unknown amounts of such costs, Congress and the DOD have begun establishing specific guidelines for their payment and funding.

The financial stakes involved in DOD contractor cleanup alone are enormous. The General Accounting Office (GAO) recently surveyed fifteen large defense contractors and—based on partial information—conservatively estimated aggregate cleanup costs between $.9 and $1.1 billion for ten of the contractors.[11] The GAO had found that four contractors filing claims received about $59 million from the DOD for preliminary cleanup efforts.[12]

This article surveys current practice and guidance governing the reimbursement of environmental compliance and

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[2] 58 Fed. Cont. Rep. (BNA) 100 (27 July 1992).

[3] Interview with Commander Don Leonard, Office of the Deputy Assistant Secretary for Defense (Environment) (Nov. 20, 1992).

[4] 54 Fed. Cont. Rep. (BNA) 12 (2 July 1990).

[5] CONGRESSIONAL BUDGET OFF., ENVIRONMENTAL CLEANUP ISSUES ASSOCIATED WITH CLOSING MILITARY BASES (Aug. 1992).

[6] *Id.*

[7] *US Army Environmental Strategy Into The 21st Century,* Army Environmental Policy Institute (1992). Since May 20, 1993, the DOD Deputy Undersecretary has been examining the issue of reimbursability of environmental costs.

[8] DOD conducts its remediation program in accordance with 10 U.S.C. § 2701 (1988) and CERCLA Sect. 120, *infra* note 27.

[9] Most of the attention in this area has focused on the need for federal facility compliance and the continued expansion of the waivers of sovereign immunity to allow state and local enforcement of environmental laws. Citing lower compliance rates for federal facilities, Congress passed the Federal Facilities Compliance Act of 1992 which expands the waiver of sovereign immunity to allow states to assess fines and penalties for past violations of solid and hazardous waste laws. The size of the remediation bill and questions about the level of cleanup involved and the time required for study and cleanup are likely to produce controversy regarding these federal cleanups similar to the criticisms leveled at the Superfund cleanup process at nonfederal sites. For a detailed discussion of the Federal Facility Compliance Act, *see* Hourcle & McGowan, *Federal Facility Compliance Act of 1992 : Its Provisions and Consequences,* FED. FACIL. ENVTL. J. Winter 1992-93.

[10] This issue has proved embarrassing as well. In 1991, the Environmental Protection Agency (EPA) issued a news release touting its success in recovering sixty-two million dollars from Lockheed in connection with the remediation of a California site. Unknown to the EPA, the DOD had agreed to reimburse Lockheed for part of the cost of the cleanup in future contracts.

[11] General Accounting Office, DOD Environmental Cleanup—Information on Contractor Cleanup Costs and DOD Reimbursements, NSIAD-92-253FS (1992).

[12] *Id.* at 3.

remediation costs and examines various aspects of the proposed environmental cost principle. If the proposed principle is approved, it will apply to all new nonremediation contracts and may affect how such costs are handled under existing and closed contracts as contracting officers use the principle for guidance.[13] The proposed principle's allowability criteria present contracting personnel with a series of highly complex environmental issues. Because these matters are beyond the experience of most contracting personnel and involve extraordinarily serious financial consequences, contracting attorneys must become knowledgeable and involved early in a contracting officer's decision process.

Environmental Compliance and Restoration

On November 19, 1992, the Secretary of the Army and the Chief of Staff signed the Army's Environmental Strategy for the 21st Century.[14] The strategy defines the Army's commitment to environmental stewardship and provides a helpful framework to analyze and group environmental issues. The Army's environmental program is organized into four pillars: compliance, restoration, pollution prevention,[15] and conservation.[16] A brief discussion of the statutory scheme involved in environmental compliance and environmental restoration is necessary to properly analyze the issue of contractor reimbursement for the costs of compliance and restoration. The differences between the statutory approaches taken for environmental compliance and restoration impact heavily in determining the availability of contractor environmental costs.

Compliance involves ensuring that current Army activities meet federal, state, and local statutory and regulatory requirements as well as Army regulations. Three central compliance statutes—the CWA, CAA, and RCRA—and a host of other environmental statutes place requirements on the Army.[17] The goal of the Clean Water Act (CWA)[18] is to restore and maintain the chemical, physical, and biological integrity of the nation's waters. To move toward that goal, all point source—a discrete outlet, such as a pipe or ditch—discharges of pollutants into navigable waters must have, and follow, a National Pollution Discharge Elimination System (NPDES) permit.[19]

The Clean Air Act (CWA)[20] establishes a framework for the attainment and maintenance of air quality standards. The CWA regulates emissions from fuels and motor vehicles, deals with ozone depletion, and regulates hazardous air pollutants and air emissions that lead to acid rain.

The Resource Conservation and Recovery Act (RCRA)[21] is often described as regulating hazardous waste from "cradle to

[13] 58 Fed. Cont. Rep. (BNA) 470 (26 Oct. 1992).

[14] The Strategy defines the Army's leadership's commitment as follows:

- Give immediate priority to sustained compliance with all environmental laws;
- Simultaneously continue to restore previously contaminated sites as quickly as funds permit;
- Focus efforts on pollution prevention to eliminate or reduce pollution at the source; and
- Conserve and preserve natural and cultural resources so they will be available for present and future generations to use.

[15] Pollution Prevention focuses on reducing waste streams by reducing hazardous material use and hazardous waste generation.

[16] The conservation pillar includes two types of activities—conservation and preservation. Conservation involves responsibly managing Army lands to insure long-term natural resource productivity. Preservation focuses on the production of resources such as wetlands, endangered species, and historic and cultural sites. The separation of these activities is not always clear. The Endangered Species Act, 16 U.S.C. §§ 1531-1544 (1988), can be viewed as a compliance statute because section nine of the Act provides for civil and criminal penalties for the unlawful taking of endangered species.

[17] A partial listing of the environmental statutes that place requirements on the Army are as follows:

a. Endangered Species Act of 1973, 16 U.S.C. §§ 1531-1544 (1988);

b. Toxic Substances Control Act, 15 U.S.C. §§ 2601-2654 (1988);

c. National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321-4370a (1988);

d. Emergency Planning and Community Right-To-Know Act of 1986, 42 U.S.C. §§ 11001-11050 (1988);

e. Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. §§ 136-136y (1988);

f. Hazardous Materials Transportation Act, 49 U.S.C. § 1803 (1988); and

g. Safe Drinking Water Act, 42 U.S.C. §§ 300f-300j-11 (1988).

[18] 33 U.S.C. §§ 1251-1386 (1988).

[19] 33 U.S.C. § 1311 (1988).

[20] 24 U.S.C. §§ 7401-7642 (Supp. IV 1993).

[21] 42 U.S.C. §§ 6901-6991h (1988).

grave."[22] The RCRA creates a comprehensive regulatory scheme for the storage, transportation, treatment, and disposal of hazardous waste. In addition to regulating hazardous waste in Subtitle C, the RCRA also regulates solid waste (Subtitle D), underground storage tanks (Subtitle I), and medical waste (Subtitle J).

These compliance statutes provide civil enforcement procedures authorizing the assessment of civil penalties for various violations of the Acts.[23] The compliance statutes also provide significant criminal penalties for violations of the Acts. Each of the compliance statutes provides for dual enforcement by the Environmental Protection Agency (EPA) and the states. For example, the CWA gives primary authority to the EPA to issue permits but allows the EPA to authorize a state to implement and enforce its own program if the state scheme contains required features including stringent regulatory standards and adequate enforcement provisions.[24]

Finally, these compliance statutes contain waivers of sovereign immunity for federal facilities that make federal and state compliance standards applicable to federal facilities. In that regard, federal contractors are required to comply with federal, state, and local requirements regardless of whether they are performing on the installation.[25] Congress recently passed the Federal Facility Compliance Act[26] that expanded the waiver of sovereign immunity under RCRA to allow states to assess fines and penalties against federal agencies for past RCRA violations.

In contrast to the focus of compliance on today's activities, restoration involves the clean up of hazardous substances resulting from past activities. Cleanups—including those at sites owned or operated by government contractors—are governed by the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA).[27]

In addition to establishing the Superfund to pay for cleanups, the CERCLA gives the federal government broad authority to clean up contamination on its own or to order others to clean it up. A principal theory of the statute is restitution; those responsible for causing hazardous substance releases should be responsible for the cleanup.[28] The CERCLA scheme is directed at remediation and creates a response, compensation, and liability scheme.

When the statute's liability scheme is triggered by a release—or threatened release—of a hazardous substance from a facility or vessel, any person (governmental or private party) who incurs response (cleanup) costs can recover those response costs from a potentially responsible party (PRP). Under the CERCLA, potentially responsible parties fall into one or more of the following categories:

a. current owners or operators of the site;

b. past owners or operators at the time of disposal;

c. generators (persons who "arrange for disposal" of hazardous substances that they possess); and

d. transporters of hazardous substances.

Those falling into one of the PRP categories are strictly liable for all response costs in most instances, unless the harm can be shown to be divisible. No requirement exists under this joint and several strict liability scheme to show that the conduct that caused the release was negligent or unlawful.[29]

Potentially responsible parties can seek contribution from other PRPs. In these contribution actions, courts can consider equitable factors—such as negligence—in determining the amount of costs to be assessed among the PRPs. In many cases, however, relative costs of cleanups between some or all of the PRPs are determined on a volumetric basis without regard to fault. In view of the CERCLA's liability scheme, much of the litigation has focused on ways to "tag" other parties as PRPs, or otherwise make them liable for cleanup

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[22] *See* Johnson, *Recyclable Materials and RCRA's Complicated, Conflicting and Costly Definition of Solid Waste*, 21 ENVTL. L. REP. (Envtl. L. Inst.) July 1991, at 10357.

[23] For example, RCRA Section 3008(a) authorizes the EPA to assess an administrative penalty for violation of RCRA Subtitle C requirements relating to the handling of hazardous waste. The penalty may not exceed $25,000 per day for each day in violation. 42 U.S.C. § 6928(a) (1988). For a detailed discussion of civil penalties, *see* Hanash, FED. FACIL. ENVTL. J. (Winter 1990-91).

[24] 33 U.S.C. § 1342(b) (1988).

[25] GENERAL SERVS. ADMIN. ET. AL., FEDERAL ACQUISITION REG. 52.236-7 (1 Apr. 1984) [hereinafter FAR].

[26] Federal Facility Compliance Act of 1992, Pub. L. 102-386, 106 Stat. 1505 (1992).

[27] Comprehensive Environmental Response, Compensation, and Liability Act, Pub. L. No. 96-150, 94 Stat. 2762 (codified in part as amended at 42 U.S.C. §§ 9601-9675). The 1986 Superfund Amendments and Reauthorization Act made CERCLA applicable to the DOD. Pub. L. No. 99-499, Sect. 120, 100 Stat. 1614 (codified at 42 U.S.C. § 9620(a)(2)).

[28] Cruden and Rogers, *CERCLA: An Overview*, Legal Education Institute, United States Department of Justice.

[29] *Id.* at 3.

costs—such as, lenders, secured creditors, insurance companies, corporation stockholders, and municipalities. Once tagged as a PRP, only limited defenses—such as, an act of God—and exclusions—for example, innocent landowner—prevent the application of joint and several liability.[30]

The CERCLA liability extends to sites where the contamination may have occurred over forty or fifty years ago, involved many parties, and involved several contaminants from multiple sources. While some recent cases have attempted to focus on the harshness of the strict liability scheme,[31] the CERCLA intends to avoid the legal morass involved in determining liability premised on a fault-based standard at old contamination sites.

Current Status of Compliance and Remediation Costs

Despite the level of interest and money involved, no statute or regulation exists which specifically addresses when a contractor's environmental costs may be reimbursed. Consequently, the current applicable standards are the fundamental criteria of allowability—reasonableness, allocability, and compliance with cost accounting standards, cost principles, and the terms of the contract.[32]

Regulatory Guidance

Some regulatory guidance is available on specific aspects of costs related to environmental compliance and remediation. Although the CERCLA cleanup costs are often characterized as "fines," the GAO feels disallowing such costs under *Federal Acquisition Regulation (FAR) 31.205-15's* prohibition on paying fines or penalties is "questionable" because monetary sanctions result not from a finding of fault, but from a contractor's status as an owner, operator, transporter, or generator of hazardous waste.[33] Further, the cost may be allowable even if characterized as a fine or penalty if incurred as a direct result of contract compliance.[34]

Maintenance and repair costs also are generally allowable so long as they "neither add to the permanent value of the property nor appreciably prolong its intended life."[35] Arguably, remediation costs needed to keep a facility operating could be allowed. Current accounting practice, however, requires that these costs be capitalized—and not expensed—when the repair extends the life, capacity, or safety and efficiency of the property as compared to the property's condition when acquired.[36] Thus, cleanup costs resulting from a previous contractor's actions should not be fully charged to one accounting period.

Contractors should look first to their insurers for reimbursement of their cleanup costs.[37] Insurance covering environmental remediation costs, however, may be effectively unavailable to some contractors.[38] *Federal Acquisition Regulation 31.205-41* recently was amended to make the "Superfund tax" allowable.[39] Superfund tax payments made between 1986 and the amendment's effective date of January 22, 1991, are treated as unallowable by the Defense Contract Audit Agency (DCAA) unless incorporated into an existing contract.[40] Furthermore, payment of consultants to aid in assessments and clean up is allowable under *FAR 31.205-33.*

Current Practice

The lack of guidance on environmental costs has manifested itself in confusion and inconsistency. The GAO recently investigated reimbursements for costs associated with remediating four hazardous waste sites used by the Boeing Company, Lockheed Corporation, and Aerojet General Corporation. The GAO found that the DOD environmental cost reimbursement decisions were inconsistent and made by contracting officers who lacked experience in environmental remediation performing ad hoc investigations into contractor wrongdoing

[30] *Id.* at 11-2.

[31] *See, e.g., United States v. Alcan Aluminum Corp.*, 964 F.2d 252 (3d Cir. 1992).

[32] FAR 31.201-2. For an excellent discussion of current allowability requirements, see TJAGSA Practice Note, *Allowability of Environmental Cleanup Costs,* ARMY LAW., Nov. 1992, at 28-32.

[33] Letter from James Hinchman, General Counsel, General Accounting Office to Representative John Conyers, Jr. (Feb. 3, 1992).

[34] United States v. General Dynamics Corp., No. 4-87-312K (N.D. Tex. May 7, 1987).

[35] FAR 31.205-24.

[36] *Capitalization of Costs to Treat Environmental Contamination Issue No. 90-8,* EITF ABSTRACTS, July 12, 1990, at 591-99 [hereinafter EITF ABSTRACTS].

[37] FAR 31.205-19(a)(3).

[38] FAR 31.205-19.

[39] FAR 31.205-41(a)(4) (FAC 90-3).

[40] *Recovery of Environmental Costs, in* COST, PRICING AND ACCT. REP. (Fed. Pub.) (Mar. 1992).

and contribution to the remediated contamination.[41] "Decisions on reimbursement varied from a complete denial to reimbursement in proportion to the Government's share of a company's business."[42]

This indeterminacy resulted in disparate treatment. For example, Lockheed was not required to seek recovery from its insurers prior to payment, whereas Aerojet was forced to sue its insurers before seeking reimbursement. Lockheed also was allowed to allocate the environmental cost from one portion of its company across its entire company as a general and administrative expense contrary to the Cost Accounting Standards. Boeing was allowed to apportion the allowable costs in proportion to the square footage dedicated to the performance of government contracts.

Contracting officers also created a compliance standard from the general requirement that a cost be reasonable. The contracting officer disallowed Aerojet's costs based on Aerojet's failure to comply with then-existing environmental regulations, a component of the proposed environmental cost principle.

The GAO recommended that the DOD develop guidance addressing the allowability of nonpenal payments to regulators, whether the CERCLA[43] costs are ordinary business expenses or extraordinary costs and can be claimed in such a way as to allow profit, and the effect of violations of law or regulation on claim approval. The GAO cautioned that the small number of cases examined prevented more detailed recommendations. The GAO's investigation will continue with congressional hearings likely during 1993.[44]

DCAA Guidance

Application of current FAR Part 31 limits on allowability has been problematic at best.[45] To remedy this situation, the DCAA and the Director of Defense Procurement issued a guidance paper on environmental costs to DCAA field audit agencies.[46] The paper attempts to allay industry concerns about auditors using the proposed principle's presumption of unallowability and other restrictions in making allowability determinations on current incurred costs and forward pricing proposals.[47] New audit guidance will be issued if the proposed environmental cost principle discussed below is approved.[48]

The guidance considers environmental costs to be "normal costs of doing business and are generally allowable costs if reasonable and allocable." In discussing reasonableness in the context of preventive and remedial environmental costs, the guidance states the methods employed and costs incurred must be consistent with the actions of a reasonably prudent businessperson. This standard's applicability to remediation costs is strained for two reasons. First, a tumultuous litigation process—not reasoned corporate decision making—often determines whether a contractor incurs the costs. Second, state and federal regulators—not the contractor—determine the actual costs to be incurred by selecting the remedy for the site based on the CERCLA study process rather than best business practices.

Remediation costs resulting from a contractor's "wrongdoing"—that is, violations of law or regulation or disregarding warnings of potential contamination—are deemed unreasonable and unallowable. Estimated remediation costs not resulting from wrongdoing should be handled as contingent costs[49] or as paid and recovered later.[50] The guidance paper recognizes that some environmental costs should be capitalized—not reimbursed as expenses—when "the effort improves the property beyond its acquisition condition or . . . the costs are part of the preparation of the property for sale."[51]

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[41] Gen. Accounting Office, Environmental Cleanup: Observations on Consistency of Reimbursements to DOD Contractors, NSIAD-93-77 (Oct. 1992).

[42] 34 Gov't. Cont. (Fed. Pub.) ¶ 629 (Oct. 28, 1992).

[43] 42 U.S.C. §§ 9601-9675 (1988).

[44] 34 Gov't. Cont. (Fed. Pub.) ¶ 629 (Oct. 28, 1992).

[45] Letter from James Hinchman, General Counsel, General Accounting Office, to Representative John Conyers, Jr., (Feb. 3, 1992) (the CERCLA cleanup costs not disallowable as fines or penalties); Peter McDonald & Scott Isaacson, *Environmental Costs for Government Contractors: Gordian Knot Redux*, 57 Fed. Cont. Rep. (BNA) 847 (June 1, 1992) at 847; *see also* Margaret O. Steinbeck, *Liability of Defense Contractors for Hazardous Waste Cleanup Costs*, 125 MIL. L. REV. 55, 66-73 (1989).

[46] Memorandum, subject: Audit Guidance on the Allowability of Environmental Costs, DCAA, PAD 730.31/92-6, (14 Oct. 1992) (reprinted in 58 Fed. Cont. Rep. (BNA) 500-06 (Oct. 26, 1992)) [hereinafter Guideline].

[47] *See, e.g.*, 58 Fed. Cont. Rep. (BNA) 254 (Sept. 14, 1992).

[48] 58 Fed. Cont. Rep. (BNA) 470 (Oct. 26, 1992).

[49] FAR 31.205-7.

[50] FAR 31.201-5.

[51] The capitalization of some environmental costs reflects evolving thought in the accounting community. *See* EITF ABSTRACTS, *supra* note 36, at 591-99.

The guidance paper uses the costs actually incurred during the period as a baseline for determining allowability. "The methods employed and the magnitude of the costs incurred must be consistent with the actions expected of an ordinary, reasonable, prudent businessperson performing non-Government contracts in a competitive marketplace."[52] Avoidable costs are not allowable; "contamination must have occurred despite due care to avoid the contamination and . . . the contractor's compliance with the law."[53] Payment of third-party liabilities based on fault and increased costs due to a contractor's delay in remediation after discovery also are not allowable.

The factual determinations required by the guidance paper are formidable and will require extensive research capabilities and technical expertise. For example, contracting and audit activities must determine how the contamination occurred to evaluate "wrongdoing," what portion of contamination is attributable to the contractor as a PRP under the CERCLA, and whether a contractor's insurance covered the contamination which generated the contractor's current remediation costs. In addition, the contracting officer will be required to determine if contractors acted prudently or delayed action after the contamination was discovered. The complex nature of these inquiries place agencies in the uncomfortable position of either accepting a contractor's claim at face value or conducting an extensive, highly technical investigation. The guidance merely states that contractors should be requested to provide documents sufficient to allow a determination as to how the contamination occurred.

Proposed Environmental Cost Principle

The initial attempt to formulate an environmental cost principle came in 1987. The CERCLA's strict liability provisions,[54] and a desire to establish uniform guidance for contracting officers, prompted the Air Force to propose an environmental cost principle making compliance costs allowable and cleanup costs unallowable except for government-owned, contractor-operated facilities (GOCO) meeting certain criteria.[55] This proposal was modified to exclude the provision on compliance costs and ultimately was withdrawn after complaints by industry.[56]

The revised version of the environmental cost principle[57]—Proposed FAR 31.205-9[58]—makes allowable a contractor's costs incurred for preventing environmental damage, properly disposing of waste generated by business operations, and complying with environmental laws and regulations imposed by federal, state, or local authorities. The clause disallows costs incurred for correcting environmental damage unless the contractor meets certain conditions.[59] Similar conditions apply to the costs incurred correcting environmental damage caused by a previous owner of the affected property.[60] The clause excludes costs resulting from liability to third parties and disallows increased environmental costs resulting from a contractor's inability to obtain the insurance required by the contract.[61]

Although the proposed principle appears straight-forward, it faces substantial opposition[62] and involves a series of com-

[52] 58 Fed. Cont. Rep. (BNA) 501-02 (26 Oct. 1992).

[53] *Id.* at 502.

[54] 42 U.S.C. § 9607(a) (1988).

[55] Defense Acquisition Regulation (DAR) Case 88-127.

[56] See Pricing and Acct. Rep., Recovery of Environmental Costs, Cost, (Fed. Pub.) at 5-7 (Mar. 1992), for a concise history.

[57] DAR Case 91-56, Civilian Agency Acquisition Counsel (CAAC) Case 90-101.

[58] The rule was sent to the FAR Secretariat on May 20, 1992, for final publication pending removal of the Presidential moratorium on final publication of new regulations. Gov't Cont. (Fed. Pub.), Vol. 34, No. 27, para. 388 (July 15, 1992). The moratorium had not been lifted when this article was written. The proposed rule appears in full in the Appendix.

[59] The contractor must demonstrate it:

(1) Was performing a government contract at the time the conditions requiring correction were created and performance of that contract contributed to the creation of the conditions requiring correction;

(2) Was conducting its business prudently at the time the conditions requiring correction were created, in accordance with then-accepted relevant standard industry practices, and in compliance with all then-existing environmental laws, regulations, permits, and compliance agreements;

(3) Acted promptly to minimize the damage and costs associated with correcting it; and

(4) Has exhausted or is diligently pursuing all available legal and contributory—that is, insurance or indemnification—sources to defray the environmental costs.

[60] Proposed FAR 31.205-9(d); *see supra* note 58.

[61] Proposed FAR 31.205-9(a)(2),(f); *see supra* note 58.

[62] Letter to Eleanor Spector, Deputy Assistant of Defense (Acquisition), from American Bar Association, Public Contract Law Section (Aug. 24, 1992); *see also* Fuqua, *Washington Pipeline*, 5 Aerospace Indus. A. Newsletter, Jan.-Feb. 1993, at 3.

plex issues. The principle's application will lead to disputes about the disallowance of a claim which will be resolved through time-consuming litigation, because of the substantial amounts involved and the penalties associated with a contractor's, including unallowable costs in requests for payment.[63]

The proposed principle requires the contractor to prove that four conditions exist to the contracting officer's satisfaction before cleanup costs are allowable. The most troublesome conditions—from the standpoint of proof—involve the causal nexus between contract performance and the condition requiring correction, and compliance with "then-accepted relevant standard industry practices" and "all then-existing environmental laws, regulations, permits, and compliance agreements."[64]

The cost principle requires factual showings by a contractor beyond those generally required in the CERCLA liability cases. Further, the required conditions are particularly difficult to apply to actions that were taken many years ago. Prudent businesspeople of the time undoubtedly never contemplated the costs associated with CERCLA, a retroactive liability law.

To satisfy the cost principle's first condition, the contractor must have been performing a government contract when the conditions requiring correction were created and performance must have contributed to the conditions requiring correction. Neither the CERCLA liability determinations, nor toxic tort actions, require this type of finding. In *Dedham Water Co. v. Cumberland Farms Dairy, Inc.*,[65] the court held that the plaintiffs need not prove that a defendant's hazardous substances actually contaminated the plaintiff's property.[66] Consequently, a contractor may be liable for cleanup costs without proof that their actions contributed to the conditions requiring correction.

The second condition requires the contractor to conduct its business prudently and in accordance with then-accepted industry practices, environmental laws, regulations, permits, and compliance-agreements. It will be extremely difficult for contracting officers to make these determinations. For this reason, the question of negligence does not arise in the CERCLA liability cases.

The question of whether a company was conducting its business prudently and in accordance with then-accepted relevant standard practices spawned a new industry for expert witnesses in toxic tort cases. In *Werlein v. United States*, plaintiffs sought damages for injuries caused by ingestion of contaminated water. The plaintiffs' "state of the art" witness testified that waste disposal practices at the facility were "substandard."[67] On cross-examination, however, the United States showed that its practices comported with those described in a trade journal of the time.[68] The United States also was prepared to offer its own "state of the art" witness to support that conclusion. Contracting officers will not have access to such evidence, at least initially. If a contractor submits a "state of the art" report, it will be difficult for the contracting officer to assess its reliability without expert assistance.

Even after lengthy discovery, difficulty exists in determining whether the contractor conducted its business in compliance with all environmental laws, regulations, permits, and compliance agreements. In many cases the law has changed during the course of the contract. For example, all the major environmental statutes were enacted during one GOCO contractor's forty-year tenure.[69] It may not be possible to determine when an action occurred which would not now comply with the law. Even when contractors attempt to ensure that environmental laws are followed, subcontractors may not. Failure of a subcontractor to follow instructions is not a defense under the CERCLA.[70]

Also problematic is the condition requiring contractors to act promptly to minimize the damage and costs associated with correcting the problem. These requirements can be

[63] 10 U.S.C. § 2324(a)(2) (1992) (penalty applies to unallowable direct costs). Legislation recently was introduced in the House of Representatives applying the unallowable cost penalty to indirect costs. 59 Fed. Cont. Rep. (BNA) 599-601 (May 10, 1993).

[64] Proposed FAR 31.205-9(c)(1), (2); *see supra* note 58.

[65] 889 F.2d 1146 (1st Cir. 1989).

[66] *Id.* at 1152.

[67] Transcript of Proceedings at 1191, Werlein v. United States, (D. Minn. 1991) (No. 3-84).

[68] *Id.* at 3100-01.

[69] The National Environmental Policy Act of 1969 (NEPA), Pub. L. No. 91-190, 42 U.S.C. §§ 4321-4347; Clean Water Act, Pub. L. No. 95-217, 91 Stat. 1567 (1988); Resource Conservation and Recovery Act (RCRA), 42 U.S.C. §§ 6901-6991h (1982 & Supp. III 1985); Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA or Superfund), 42 U.S.C. §§ 9601-9675 (1980); Superfund Amendments and Reauthorization Act (SARA), Pub. L. No. 99-499, 100 Stat. 1614 (1986).

[70] O'Neil v. Picillo, 682 F. Supp. 706, 722 (D.R.I. 1988), *aff'd* 883 F.2d 176 (1st Cir. 1989), *cert. denied* 110 S. Ct. 1115 (1990). From 1970 through 1977, American Cyanamid contracted with Chemical Control Corporation for transportation to, and incineration of, wastes at Chemical Control's New Jersey facility. In 1977, American Cyanamid wastes transported by Chemical Control were found in trenches on a pig farm in Rhode Island. American Cyanamid was liable for cleanup costs.

inconsistent. To minimize the damage, a contractor must move quickly. This, however, may maximize costs. For example, at a landfill site, it may take years of negotiations to arrive at a fair settlement. The requirement is appropriate when the EPA will implement a more costly remedy if the PRPs do not agree to undertake an action pursuant to an order under the CERCLA Section 106.[71] Immediate action may not be appropriate, however, when a contractor is sued by a PRP for contribution or when the EPA or a state seeks an overly conservative remedy.

The notion of acting promptly is problematic under the CERCLA as well. Required investigations can take years. For instance, the CERCLA process has been underway for almost ten years at Rocky Mountain Arsenal, near Denver, Colorado, but a final remedy has not yet been selected. In such a case, is signing a consent decree sufficient, or must interim response actions, which may later prove to be inconsistent with the final remedy and not cost effective, be undertaken? These questions will be very difficult for contracting officers to answer.

The final condition requires the contractor to exhaust or diligently pursue possible contributors. As demonstrated above, there may be any number of possible PRPs. This type of information also will not usually be available to the contracting officer.

The condition also specifically identifies insurance policies as possible sources of contribution. The question of coverage under comprehensive general liability insurance policies "is one of the more difficult issues to face the courts."[72] Given the wide range of litigation on insurance coverage, submission of an insurance claim and denial of coverage will not be sufficient. If it were, initial denials would become the standard. Alternatively, some companies have spent years pursuing insurance coverage. For example, the Shell Oil Company has pursued coverage for environmental costs at Rocky Mountain Arsenal for eleven years.[73] Because these cases are fact- and policy-specific, this area of the law may not be settled for ten-to-twenty years. More than an exchange of letters will be necessary, but years of litigation is undesirable.

ABA Reaction

The American Bar Association (ABA) Public Contract Law section, cited some of these same concerns in comments regarding the cost principle.[74] In addition to arguing that the presumption against allowability is inconsistent with the *FAR*'s general framework, the ABA concluded that it is wrong to presume such costs are based on the fault of the contractor, and therefore unallowable, because cleanup costs are generally assessed without regard to fault. The ABA argues that the burden should not be on the contractors to show that they acted properly.

The ABA also concluded that the rule would be hard to administer and would require contracting officers to make judgments outside their area of expertise. The ABA recommends a more objective standard, a showing that an administrative or judicial tribunal determined the contractor violated a fault-based environmental law before the costs are presumed to be unallowable. While that certainly is an objective standard, such determinations often are not available. Using the ABA's approach, massive liability for cleanups will be quietly, but surely, passed to the taxpayer.

Definitional Concerns

Beyond considerations of proof, the cost principle suffers from a lack of definition. For example, the principle uses, but does not define, the term "environmental damage." The Army and Navy unsuccessfully attempted to substitute the broader term "preventing pollution" to avoid a narrow interpretation limiting allowability to pollution abatement costs. The substitution was rejected as the plain reading of "environmental damage" was deemed sufficient.

The proposed principle excludes "any costs resulting from a liability to a third party"[75] from its coverage. This exclusion does not make third-party liability costs unallowable; it relegates determinations to the general allowability analysis of reasonableness, allocability, and compliance with cost accounting standards and the terms of the contract.[76] Under current DCAA and DOD guidance, however, any liability to third parties resulting from the contractor's fault is unallowable.[77] Here again, most third-party liability determinations are not fault-based.

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[71] 42 U.S.C. § 9606 (1988) abatement actions. This section allows the EPA to issue an order, where there is an imminent and substantial endangerment to the public health or welfare or the environment, to compel remediation of a site.

[72] Kyle E. McSlarrow, David E. Jones, Eric J. Murdock, *A Decade Of Superfund Litigation: CERCLA Case Law From 1981-1991*, 21 ELR, 10367, 10407.

[73] Shell Oil Co. v. Winterthur Swiss Ins. Co., No. A-045544 (Cal. App. Jan. 21, 1993). Between January 1982 and June 1983, Shell filed claims with various insurers. In October 1983, Shell initiated litigation regarding or concerning eight hundred insurance policies.

[74] *See* Letter to Eleanor Spector, *supra* note 62.

[75] Proposed FAR 31.205-9(a)(2); *see supra* note 58.

[76] FAR 31.201-2. Care still must be taken to evaluate whether the submitted cost is an allowable expense or unallowable depreciation. *See* EITF ABSTRACTS, *supra* note 36, at 591-99.

[77] Guideline, *supra* note 46.

The principle, however, does not define liability to third parties. It is not clear whether the term "third parties" applies to the EPA, other PRPs, or tort plaintiffs. Few cleanup costs will be reimbursable if all three are excluded.

Excluding third-party liability costs from reimbursement deprives PRP contractors of the incentive to oppose liability. When PRPs defend against liability claims, the EPA may undertake the cleanup while the liability claim is being resolved. If a PRP contractor opposes liability and loses, the resulting costs from the EPA-initiated cleanup would be non-reimbursable. If, however, the PRP contractor admits liability and pays for the cleanup on its own, the resulting costs would be reimbursable. This scenario will increase the DOD's environmental costs because its PRP contractors have no incentive to oppose liability.

Third-party liability is one of the largest potential environmental costs facing the government and affects virtually every government facility. The contracting officer is left without guidance in this area, and claims results will continue to be inconsistent.

The government and contractors face two types of third-party liability: offsite landfill cleanup costs (CERCLA liability) and toxic tort claims and suits. All military installations and contractors face CERCLA liability from disposal of their waste. The installation and contractors either disposed of waste in their own landfills—which may require remediation—or waste was shipped to a disposal site off their property. Many contractors and government agencies used both methods of disposal.

The CERCLA gives the EPA broad authority to seek reimbursement for cleanup costs. At offsite landfills, the government contractor may be named as a PRP in two ways. In some cases, the EPA sues PRPs directly. In others, the EPA sues or issues an order against some PRPs, and those PRPs sue others. The evidence used to name PRPs in these cases is largely circumstantial. For that reason, the information required by the environmental cost principle may not be generated.

For instance, one GOCO munitions production facility was managed by the same contractor for over forty years. During that time, waste was disposed both on and offsite. Between 1972 and 1978, the contractor contracted with three waste removal companies. These waste haulers took waste to a variety of landfills, including three which have been named as CERCLA cleanup sites. The military installation has been named a CERCLA site. The installation contractor has been named as a PRP at all three third-party landfill sites. The Army also has been named as a PRP at two of the sites.

Definitive evidence linking a facility's waste to a third-party landfill often does not exist. If records exist that show a waste hauler sent some loads of trash to one landfill, all customers during that time period may be held liable. It is not necessary to establish that a particular defendant's waste went to the site. In *United States v. Monsanto*,[78] the court held that plaintiffs do not have to show a particular defendant owned the specific waste at the site, rather plaintiff's must demonstrate that the waste released is chemically similar to the defendant's waste.[79] The court noted that to "require a plaintiff under the CERCLA to 'fingerprint' wastes is to eviscerate the statute."[80] Because some of the customer's trash most likely went to that particular landfill, and because PRPs may be considered jointly and severally liable,[81] settlement masters may assume, absent specific evidence to the contrary, that all of the customer's waste went to that site for purposes of allocation. A PRP may be required to pay for the same volume of waste at more than one site.

It does not matter that neither the Army nor the contractor chose the disposal site.[82] The contractor "arranged" for disposal pursuant to section 107(a)(3) of the CERCLA by contracting for waste disposal. In this case, the contractor submitted claims for the costs incurred. Many of those claims have been paid.

The other potential third-party liability is toxic tort litigation. Toxic torts are tort actions for injury or property damage caused by exposure to toxic substances.[83] This type of litigation has become much more prevalent in recent years.[84]

In the mid-1980s, the contractor discussed above was sued, along with the Army, by nearly one hundred plaintiffs. The plaintiffs alleged they had sustained injuries by ingesting groundwater contaminated with trichloroethylene (TCE). The installation is a source of the groundwater contamination. The

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[78] 858 F.2d 160 (4th Cir. 1988), *cert. denied* 490 U.S. 1106 (1989).

[79] *Id.* at 169.

[80] *Id.* at 170 (citing United States v. Wade 577 F. Supp. 1326, 1332 (E.D. Pa. 1983).

[81] United States v. Chem-Dyne Corp., 572 F. Supp. 802, 808 (1983), O'Neil v. Picillo, 883 F.2d 176, 183 (1st Cir. 1989), United States v. Meyer, 889 F.2d 1497, 1506 (6th Cir. 1989).

[82] United States v. Conservation Chemical Co., 619 F. Supp. 162, 234 (D.C. Mo. 1985), United States v. Ward, 618 F. Supp. 884, 895 (E.D. N.C.).

[83] MICHAEL DORE, ET. AL., LAW OF TOXIC TORTS, 2-3, (1992).

[84] *Id.* at A-1.

contractor settled the litigation and submitted a request for reimbursement which was granted by the Army.

A variety of toxic tort actions have been filed regarding a former chemical weapons production facility. This site also is a CERCLA site. In 1990, seventy-eight area residents sought over a quarter of a million dollars from a former installation tenant and the Army for alleged injury arising from vapors emitted during the remediation of a contaminated area onsite. In a similar factual situation, a government contractor could be named as well. Former GOCO contractors may be particularly susceptible to this type of litigation.

Third-party liability is a significant issue for the federal government, potentially worth billions of dollars. Because this issue is not clearly addressed by the proposed environmental cost principle, third-party liability claims will continue to be evaluated on an ad hoc basis.

Allocability

The proposed principle contains no guidance on determining allocability of environmental costs. Although considered, allocability language was not included because it was thought such rules should come from the Cost Accounting Standards Board.[85] General allocability analysis involves determining whether a cost is incurred specifically for the contract, or benefits both the contract and other work and can be distributed to them in reasonable proportion to the benefits received, or is necessary to the overall operation of the business although a direct relationship to any particular cost objective cannot be shown.[86]

Because the proposed principle does not apply to environmental remediation contracts,[87] allocability may only rarely be based on a cost being incurred specifically for the contract or for both the contract and other work. Therefore, the contractor must show that the expenditure in question is necessary to the contractor's overall operation and the expenditure benefits the government.[88] Unfortunately, benefit to the government is an "extremely slippery concept . . . [having] a more or less general scope depending upon the type of expense . . . [and] policy considerations."[89] No cases to date directly address the allocability of cleanup costs.

The allocability analysis can become complicated because environmental damage requiring clean up often has a long latency period—that is, the actual contamination occurred years before the condition requiring clean up was discovered.[90] By the time contamination is discovered, the responsible contractor no longer may hold government contracts or be in the business.

Current DCAA and DOD guidance on allocability of environmental costs allows allocation "as an indirect expense using a causal or beneficial base."[91] Remediation costs are considered period costs, allocable to the pertinent segment[92] of the contractor. "Each closed segment case must be reviewed . . . to determine if the costs . . . should be directly allocated to other segments, . . . as residual home office costs, or be treated as an adjustment of the extraordinary costs associated with the closing of the segment."[93] In effect, contractors may allocate remediation costs as overhead to other contracts, even for sites involving closed contracts. Contractors also may start including such costs in price estimates and bids for other contracts. These proposals should be evaluated carefully as remediation cost estimates are notoriously inaccurate, leading to potential funding problems as the true costs become known.

Conclusion

A possible solution to the uncertainty of environmental costs involves the use of advance agreements under *FAR 31.109*. Advance agreements may be negotiated before or during a contract and resolve issues of reasonableness and allocability before the cost is incurred, thereby specifying the treatment of costs incurred in the future to remedy past contamination.[94] *Federal Acquisition Regulation 31.109(h)* soon may be amended to add environmental costs as an "example

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[85] DAR Case 91-56.

[86] FAR 31.201-4.

[87] Proposed FAR 31.205-9(e); *see supra* note 58.

[88] FAR 31.201-4(c); FMC Corp. v. United States, 853 F.2d 882 (Fed. Cir. 1988); Lockheed Aircraft Corp. v. United States, 375 F.2d 786; 179 Ct. Cl. 545 (1967); Daedalus Enters., Inc., ASBCA No. 43602 (May 18, 1992).

[89] *Lockheed*, 375 F.2d at 795-96.

[90] For example, in 1981, the EPA found trichloroethylene and other toxic substances in the groundwater near Air Force Plant 44, Tucson, Arizona. Hughes Aircraft, the contractor operating Plant 44, had been disposing of the substances in pits for decades, an acceptable method at the time of disposal. The Navy's Camp Allen at the Norfolk Naval Base, Virginia, faces a similar problem. *Hazardous Waste Problems at Department of Defense Facilities: Hearings Before the Subcomm. on Environment, Energy, and Natural Resources of the House Comm. on Government Operations*, 100th Cong., 2d Sess. 5, 90, 94, 142 (1987).

[91] Guideline, *supra* note 46.

[92] A segment consists of two or more divisions, product departments, plants, or other subdivisions or an organization reporting directly to the home office usually identified with responsibility for profit or producing a product or service. 48 CFR § 31.001 (1993).

[93] Guideline, *supra* note 46.

[94] FAR 31.109(a).

of costs for which advance agreements may be particularly important."[95]

Some sort of assessment determining the government's potential exposure should be completed before agreeing to liability caps. Any advance agreement including remediation costs should provide for the government's participation in insurance claim recoveries.[96]

The proposed environmental cost principle attempts to provide guidance on a burgeoning and complex series of questions. Consensus for reimbursement of compliance costs exists. Unfortunately, the proposed principle may not solve the problem concerning remediation costs.[97] Contracting personnel will have to make difficult factual and legal decisions involving large sums. Disputes and litigation are a certainty. The current and proposed rules are not adequate to the task.

No realistic estimate of the future costs to the DOD exists. This is an area where Congress must develop a solution. No matter what form the ultimate environmental cost principle takes, the best approach to the environmental cost morass is to avoid it as much as possible through the proactive use of advance agreements.

APPENDIX

31.205-9 Environmental costs.

(a) Environmental costs—

(1) Are those costs incurred by a contractor for:

(i) The primary purpose of preventing environmental damage; properly disposing of waste generated by business operations; complying with environmental laws and regulations imposed by Federal, State, or local authorities; or

(ii) Correcting environmental damage.

(2) Do not include any costs resulting from a liability to a third party.

(b) Environmental costs in paragraph (a)(1)(i) of this subsection, generated by current operations, are allowable, except those resulting from violation of law, regulation, or compliance agreement.

(c) Environmental costs in paragraph (a)(2)(ii) of this subsection, incurred by the contractor to correct damage caused by its activity or inactivity, or for which it has been administratively or judicially determined to be liable (including where a settlement or consent decree has been issued), are unallowable, except when the contractor demonstrates that it:

(1) Was performing a Government contract at the time the conditions requiring correction were created and performance of that contract contributed to the creation of the conditions requiring correction;

(2) Was conducting its business prudently at the time the conditions requiring correction were created, in accordance with then-accepted relevant standard industry practices, and in compliance with all then-existing environmental laws, regulations, permits, and compliance agreements;

(3) Acted promptly to minimize the damage and costs associated with correcting it; and

(4) Has exhausted or is diligently pursuing all available legal and contributory (e.g., insurance or indemnification) sources to defray the environmental costs.

(d) In cases where the current contractor is required to correct environmental damage which was caused by the activity or inactivity of a previous owner, user, or other lawful occupant of an affected property, the resulting environmental costs are unallowable, except when the current contractor demonstrates that:

(1) The previous owner, user, or other lawful occupant's actions satisfy the criteria in paragraphs (c)(1) through (3) of this subsection, and

(2) The current contractor has complied with paragraphs (c)(3) and (4) of this subsection during the period that it has owned, used, or occupied the property.

(e) Paragraphs (c) and (d) of this subsection do not apply to costs incurred in satisfying specific contractual requirements to correct environmental damage (e.g., where the Government contracts directly for the correction of environmental damage at a facility which it owns).

(f) Increased environmental costs resulting from the contractor's failure to obtain all insurance coverage specified in Government contracts are unallowable.

(g) Costs incurred in legal and other proceedings, and fines and penalties resulting from such proceedings, are governed by 31.205-47 and 31.205-15, respectively.

[95] Proposed FAR 31.109(h)(18); *see* DAR Case 91-056.

[96] Guideline, *supra* note 46. This approach, although not foolproof, is more efficient than litigating a low payment of a claim under an excess insurer theory; *see* All State Ins. Co. v. Brown, 736 F. Supp. 705, 710, n.5 (W.D. Va. 1990). The insurance issue is obviated in large part by insurance companies' wide use of "pollution exclusion" clauses to avoid paying remediation claims.

[97] Letter from Public Contract Law Section, American Bar Association, to DAR and CAA Councils, 58 Fed. Cont. Rep. (BNA) 184-85 (Aug. 17, 1992).

Clerk of Court Notes

Court-Martial and Nonjudicial Punishment Rates

The following tables reflect the court-martial and nonjudicial punishment rates for the second and third quarters of fiscal year 1993. Mr. Fulton.

COURT-MARTIAL AND NONJUDICIAL PUNISHMENT RATES

RATES PER THOUSAND

Second Quarter Fiscal Year 1993; January-March 1993										
	ARMYWIDE		CONUS		EUROPE		PACIFIC		OTHER	
GCM	0.40	(1.62)	0.33	(1.33)	0.72	(2.88)	0.46	(1.83)	1.48	(5.92)
BCDSPCM	0.13	(0.51)	0.13	(0.54)	0.13	(0.54)	0.08	(0.33)	0.54	(2.15)
SPCM	0.02	(0.06)	0.01	(0.04)	0.05	(0.21)	0.00	(0.00)	0.00	(0.00)
SCM	0.15	(0.61)	0.13	(0.52)	0.29	(1.15)	0.19	(0.75)	0.00	(0.00)
NJP	19.65	(78.60)	21.30	(85.19)	18.66	(74.62)	19.23	(76.91)	20.19	(80.75)

Note: **Based on average strength of 590873**
Figures in parentheses are the annualized rates per thousand

COURT-MARTIAL AND NONJUDICIAL PUNISHMENT RATES

RATES PER THOUSAND

Third Quarter Fiscal Year 1993; April-June 1993										
	ARMYWIDE		CONUS		EUROPE		PACIFIC		OTHER	
GCM	0.41	(1.65)	0.38	(1.53)	0.61	(2.44)	0.42	(1.68)	0.94	(3.76)
BCDSPCM	0.16	(0.63)	0.14	(0.54)	0.20	(0.81)	0.23	(0.92)	0.94	(3.76)
SPCM	0.02	(0.09)	0.02	(0.09)	0.03	(0.13)	0.02	(0.08)	0.00	(0.00)
SCM	0.16	(0.65)	0.15	(0.61)	0.22	(0.90)	0.25	(1.01)	0.00	(0.00)
NJP	18.94	(75.77)	20.26	(81.03)	18.16	(72.63)	19.03	(76.12)	26.35	(105.42)

Note: **Based on average strength of 580174**
Figures in parentheses are the annualized rates per thousand

Claims Report

United States Army Claims Service

Tort Claims Note

Processing AAFES and NAFI Claims

Army claims offices often receive claims for death, personal injury, or property damage allegedly caused by the wrongful or negligent acts or omissions of employees of the Army and Air Force Exchange Service (AAFES) or other Non-Appropriated Fund Instrumentalities (NAFI). As claims office personnel, you need to take special steps in handling those claims. The purpose of these special steps are twofold. The first is to put AAFES or the Army Central Insurance Fund (ACIF) on notice of its potential liability and allow it to add pertinent information to the investigation of the claim. The second is to ensure that we pay meritorious claims with proper funds.

The first special step that you should take on receiving such a claim is to clearly identify it with the letters "NAF" on the claim folder following the claimant's name to alert all who handle the claim that the other steps need to be taken. Marking the folder in this way also should ultimately preclude erroneous payment from appropriated funds.

When dealing with a claim arising from AAFES activities, the second special step that you should take is to promptly send a copy of the claim to AAFES at the following address: Headquarters, Army and Air Force Exchange Service, ATTN: GC-Z/CC, P.O. Box 660202, Dallas, Texas 75266-0202. Do this regardless of the amount of the claim. The current point of contact for AAFES on such claims is Ms. Mona Clark. Her telephone numbers are (214) 312-2642 or DSN 967-2642.

When dealing with a claim in excess of $15,000—arising from the activities of a NAFI other than AAFES—the second special step that you should take is to promptly send a copy of the claim to the Army Central Insurance Fund at the following address: Army Central Insurance Fund, HQDA, ATTN: DACF-RMI, Alexandria, Virginia 22331-0508. Do not do this if the NAFI claim does not exceed $15,000. The current point of contact for ACIF on its claims is Ms. Terry Mullen. Her telephone numbers are (703) 325-9480 or DSN 221-9480.

The third special step that you should take comes in the context of the investigation. If the wrongful or negligent acts or omissions of government employees proximately caused the harm alleged, in addition to determining whether government employees caused them, determine whether the government employees were appropriated or nonappropriated fund employees. For example, although an incident may have taken place at a NAFI facility, you want to determine whether an appropriated fund activity or its employees had any responsibilities which were neglected and contributed to the harm, such as a duty to repair or maintain an AAFES/NAFI facility. As another example, you want to determine whether the military or civilian employees involved were being paid from appropriated funds or nonappropriated funds at the time of the incident. Appropriated fund employees do "moonlight" as AAFES or NAFI employees. It is important to make such determinations to ensure that we pay awards from the proper funds. If both an appropriated fund activity and a NAFI share liability for the harm done, then payments are shared between appropriated and nonappropriated funds in proportion to the degree of liability. See *Department of Army Regulation 27-20 (AR 27-20), Legal Services: Claims*, paragraph 12-5 (28 February 1990) and *Department of Army Pamphlet 27-162, Legal Services: Claims*, paragraph 5-61(b) (15 December 1989) for in-depth guidance on the investigation of NAFI and AAFES claims.

If you determine that AAFES or a NAFI is partially or fully liable and the appropriate authority approves a settlement, you should take the fourth special step, if you are in the office of the settlement authority. Send the following documents to the appropriate disbursing office:

1. The original and one copy of the claim form.
2. The action approving the claim.
3. The settlement agreement.

If the settlement authority is at a higher level such as the United States Army Claims Service (USARCS), then it will send the appropriate documents to the disbursing office.

The following addresses are for disbursing offices for AAFES Claims. For all payable United States AAFES claims, send the documents to HQ AAFES, ATTN: FA-I, P.O. Box 650428, Dallas, Texas 75265-0428. For claims payable for under $2500 generated by Korea AAFES activities, send the documents to the Korea Sales District, ATTN: FA, Unit 15555, APO AP 96205-0003. For claims payable for under $2500 claims generated by Japan AAFES, send the documents to AAFES-Yokota, ATTN: PACRIM-FA-JAPAN, Unit 5203, APO AP 96328-5203. For claims payable for under $2500 originating in Okinawa, Guam, Thailand, and other Pacific Areas not specifically listed above, send the documents to AAFES-PACRIM-ASC, ATTN: FA, Unit 35163, APO AP 97378-5163. For European AAFES claims payable for under $2500, send the documents to AAFES-Europe, European Accounting Support Office, Unit 23149, APO AE 09227-0003. For all payable non-United States AAFES claims in excess of $2500, send the documents to HQ AAFES, ATTN: FA-I, P.O. Box 650428, Dallas, Texas 75265-0428. (The information contained in *AR 27-20*, paragraph 12-7 on the transmittal of claims under $2500 to AAFES regional headquarters is out of date and should be disregarded).

For non-AAFES NAFI claims in excess of $100, the disbursing office address is Army Central Insurance Fund, HQDA, ATTN: DACF-RMI, Alexandria, Virginia 22331-0508. For non-AAFES claims of $100 or less, the disbursing office is the NAFI from which the claim arose.

Contact your area action officer at the USARCS if you have questions on the special steps for AAFES and NAFI claims. Captain Veldhuyzen.

Personnel Claims Notes

Recommended Payment Procedures in a Claims Office Using Standard Financial System Redesign (STANFINS SRD1)

The STANFINS system provides computerized issuance of checks and reduces processing times at the local Defense Finance Accounting Service (DFAS). Claims offices can access this system to generate payment vouchers that are routed directly to the disbursing division, not commercial accounts, for payment.

The following procedure is recommended when using STANFINS to process a claim for payment. The claims judge advocate (CJA) reviews the adjudicated claim and signs the *DD Form 1842* if he or she concurs with the amount awarded. If changes are to be made, the claim is returned to the claims examiner, and then returned to the CJA to sign the *DD Form 1842*. The claims noncommissioned officer in charge (NCOIC), claims examiner, or claims clerk then enters the basic data for the claim on STANFINS using the general access claims office password. A disbursement date two days from the date of input is recommended to ensure the payment report arrives at the local DFAS before the check is cut. Dates more than two days are discouraged. For emergency payments, the person inputting data can enter "window pickup" in place of the claimant's mailing address to notify the local DFAS that the claimant will pick up his or her check at the cashier's cage. After entering the basic data for a particular claim, the NCOIC, claims examiner, or claims clerk prints the STANFINS summary screen, updates the claims management program to reflect payment, prints the payment report and presents the entire claims file with the accompanying documents to the CJA for approval and signature.

The CJA compares the payment report with the basic claims information from the file to ensure the accuracy of this information—that is, the claims number, the amount to be paid, the claimant's name and address, and the type of claim. If no discrepancies exist, the CJA signs the payment report and logs into STANFINS using a private password. The CJA calls up the claims information using the system document number from the summary screen and approves payment before logging off.

The NCOIC, examiner, or clerk then hand carries the signed payment report on a transmittal letter to the local DFAS as substantiation for payment. The courier can pick up the comeback copy of vouchers previously processed.

Each claims office using STANFINS SRD1 should be able to conduct a data query, which lets the claim office obtain automated reports on claims payments and refund deposits. "Office Management Note," located on page sixty-four of the March 1991 issue of *The Army Lawyer,* contains additional information on the data query. Monthly reconciliation of all accounts is essential for proper office management and soon will be mandated by *AR 27-20.* Lieutenant Colonel Kennerly and Captain Boucher.

Processing Recovery Demands

Under provisions of *Department of the Army Pamphlet 27-162*, paragraph 3-21, the following claims are forwarded to the USARCS for dispatch of demand packets under centralized recovery procedures.

a. Non-Increased Released Valuation (IRV) shipments when the through government bill of lading (TGBL) carrier's liability exceeds $300 (See Claims Report, *The Army Lawyer,* October 1993). This category includes codes 4, 5, 6, 7, 8, *J,* and *T* shipments.

b. Increased Release Valuation shipments when the TGBL carrier's liability exceeds the field claims office's $500 or $1000 monetary jurisdiction.

c. Through government bill of lading shipments involving liability by one or more third parties. This includes claims involving both a TGBL carrier and a nontemporary storage warehouse, and it also includes TGBL shipment claims involving more than one carrier.

d. Overseas TGBL shipments, except European unaccompanied baggage shipments.

e. Claims involving payments by private insurers.

f. Claims for mobile home shipments.

g. Claims involving bankrupt carriers.

Recently, in exercise of its oversight responsibility for field claims offices, the USARCS discovered that a number of field claims offices are not complying with the above recovery procedure, especially with claims on non-IRV recovery over $300 (changed from $100 on 1 October). It is the USARCS' responsibility to assert such claims, not the field office. Claims Judge Advocates, claims attorneys, and other claims supervisory personnel should review their recovery procedures, and where they find these procedures not in compliance with their recovery monetary jurisdiction, make corrections. Lieutenant Colonel Kennerly.

Professional Responsibility Notes

OTJAG Standards of Conduct Office

Ethical Awareness

The following case summaries describe civilian court decisions on issues addressed in the Army's *Rules of Professional Conduct for Lawyers* (*Army Rules*).[1] Lieutenant Colonel Fegley.

Case Summaries

Army Rule 8.5
(Jurisdiction)

Every Army lawyer subject to these Rules also is subject to rules promulgated by his or her licensing authority or authorities.[2]

Army Rule 4.2
(Communication with Person Represented by Counsel)

In representing a client, a lawyer shall not communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other to do so.[3]

The Professional Responsibility Notes section of the November 1992 issue of *The Army Lawyer*[4] reported the case of *In re John Doe*.[5] During a criminal trial in the District of Columbia Superior Court, the court determined that an Assistant United States Attorney—identified in court records only as John Doe—may have violated Disciplinary Rule 7-104 of the District of Columbia Code of Professional Responsibility which prohibits a lawyer representing a party in interest from knowingly communicating with a party represented by another lawyer.[6] The court referred the matter to the District of Columbia's disciplinary board which determined that it lacked jurisdiction to proceed against the attorney. That board referred the matter to the New Mexico state disciplinary board because Doe was admitted only to the New Mexico Bar and was permitted to practice as an Assistant United States Attorney in the District of Columbia solely by virtue of his New Mexico license. Doe removed the proceedings to the District Court for the District of New Mexico, and the New Mexico disciplinary board responded by filing a petition to remand.

The district court found that it lacked jurisdiction over the case, and, in doing so, held that federal lawyers are subject to state ethics rules. The court observed that to remove an action against a federal authority, a movant must allege that his or her federal office entitles him or her to a colorable federal defense. It expressly rejected Doe's assertion that "federal law" authorizing prosecutors to communicate with represented parties gives rise to such a defense. In support of this argument, Doe had cited a Department of Justice directive issued in June of 1989 ("the Thornburgh memorandum") which asserts that a federal prosecutor does not violate Disciplinary Rule 7-104 of the American Bar Association Model Code of Professional Conduct by maintaining contacts with a represented individual during law enforcement investigations and proceedings prior to initiation of formal criminal or civil proceedings.[7] The court ruled, however, that Department of Justice directives are not binding authority, stating that to accept them as such would allow any agency to issue a regulation exempting itself from ethical restrictions. The November 1992 edition of *The Army Lawyer* reported that the court remanded the proceedings to the New Mexico state bar authorities.

In a subsequent development, the Justice Department sued the Chief Disciplinary Counsel of New Mexico in the District Court for the District of Columbia to enjoin an inquiry by the Disciplinary Board into Doe's conduct.[8] The court granted a preliminary injunction, but subsequently granted the defendant's motion to dismiss the complaint. In doing so, the court first determined that it lacked personal jurisdiction over the defendant. More significantly, however, the court ruled that even if it had personal jurisdiction over the defendant, it would have concluded that Doe was not protected by the Supremacy Clause and that, accordingly, his conduct was not "authorized by law" as a result of "the Thornburgh memorandum." That memorandum—described by the court as a unilateral statement of policy issued by the head of an executive agency—does not constitute "federal law" for purposes of preempting state regulation of attorney ethics. The court noted that the memorandum was neither promulgated pursuant to notice and comment rulemaking nor published in the *Federal Register*. Furthermore, the court cited a statute that requires all Department of Justice attorneys to be "duly licensed and

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[1] DEP'T OF ARMY, REG. 27-26, LEGAL SERVICES: RULES OF PROFESSIONAL CONDUCT FOR LAWYERS (1 May 1992) [hereinafter AR 27-26].

[2] *Id.* rule 8.5.

[3] *Id.* rule 4.2

[4] *See generally* Professional Responsibility Notes, ARMY LAW., Nov. 1992, at 51.

[5] *In re* John Doe, No. CIV. 90-1020-JB (D.N.M. Aug. 4, 1992) (order granting motion to remand).

[6] *See generally* MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-104(a)(1) (1980).

[7] *Id.*

[8] United States v. Ferrara, No. Civ. 92-2869 (D.D.C. May 28, 1993) (order granting motion to dismiss).

authorized to practice as an attorney under the laws of a State, territory, or the District of Columbia."[9] Because this requirement necessarily implies compliance with state bar ethical standards by attorneys practicing in the Department of Justice, the court concluded that Congress, therefore, authorized such state regulation of the federal function, and declined to interfere with that regulation.

Additional developments in this matter also have occurred outside the courtroom. On November 20, 1992, the Department of Justice issued for comment a proposed rule that would codify "the Thornburgh Policy."[10] A "final" version of the rule was withdrawn from publication two days after President Clinton's inauguration. The proposed rule was reissued by Attorney General Janet Reno on July 14, 1993, and was published in the *Federal Register* on July 26, 1993.[11] A summary of the comments received on the prior issuance of the proposed rule was published with the reissued rule. The announcement reissuing the proposed rule stated that "no decisions have been made on whether to adopt the rule" and that the purpose in reopening the comment period is to "ensure that all interested parties have a chance to comment."

Army Rule 1.10(a)
(Imputed Disqualification: General Rule)

Army lawyers working in the same Army law office are not automatically disqualified from representing a client because any of them practicing alone would be prohibited from doing so.[12]

The Maryland Court of Special Appeals has held that a public defender's office is not per se a "law firm" for purposes of a rule preventing members of the same firm from representing codefendants with inconsistent defenses in the same criminal case.[13] In the case before the court, a defendant who had been convicted of assault contended that he was denied effective assistance of counsel because he was represented by an assistant public defender from the same office as another public defender who was representing his codefendant. The court determined that an actual or inherent conflict of interest does not per se exist when public defenders represent codefendants with inconsistent defenses. Such claims should be examined on a case-by-case basis. Where each attorney's practice is separated from the other's such that the interchange of confidential information can be avoided or where it is possible to create such a separation, no inherent ethical bar to their representation of antagonistic interests exists.

Trial courts should consider what measures a public defender's office has taken to screen its members from one another. Public defenders may make accommodations within a specific office that can sufficiently insulate, from one another, assistant public defenders who operate from the same office and who are simultaneously representing codefendants. These institutional changes may include early screening of cases, structural and procedural separations within the office, and other innovations in the handling of cases involving codefendants that are conducive to avoidance of any conflict of interest.

Army Rule 1.10[14] and its comment recognize that the circumstances of military legal practice may require representation of opposing sides by Army lawyers working in the same law office. Just as the Maryland court applied a case-by-case analysis in determining whether a lawyer is disqualified, the Army Rules require a functional analysis of the facts in a particular situation. Key to the analysis is the ability of the attorney to preserve attorney-client confidentiality, maintain independent judgment, and avoid positions adverse to the client. Preservation of confidentiality is a question of access to information, which is, in turn, a question of how the attorneys in an office work together. So as not to compromise the ability of attorneys in military legal offices to represent parties with adverse interests when the need arises, office policies concerning client screening, information handling, file access, and consultation between attorneys and by attorneys with supervisory attorneys should be reviewed periodically. Steps that will assist in preserving confidentiality should be implemented when possible.

[9] *See* Pub. L. No. 96-132, 93 Stat. 1040, 1044 (1979) (appropriations for fiscal year 1980); *see also* Pub. L. No. 102-395, 106 Stat. 1828, 1838, § 102(a) (1992) (appropriations for fiscal year 1993, reenacting provisions of Pub. L. 96-132).

Members of the Judge Advocate Legal Service (JALS) are under similar requirements; *cf.* UCMJ art. 6 (1988) (assignment for duty of judge advocates); *id.* art. 27(b) (detail of trial counsel and defense counsel: "member of the bar of a Federal court or of the highest court of a State"); DEP'T OF ARMY, REG. 27-1, LEGAL SERVICES: JUDGE ADVOCATE LEGAL SERVICE, para. 13-2h (15 Sept. 1989) ("Be admitted to practice and have membership in good standing of the bar of the highest court of a state of the United States, the District of Columbia, Puerto Rico, or a Federal court"); DEP'T OF ARMY REG. 601-100, PERSONNEL PROCUREMENT: APPOINTMENT OF COMMISSIONED AND WARRANT OFFICERS IN THE REGULAR ARMY, para. 2-51c (1 Sept. 1981) ("Be admitted to practice before the highest court of a State or a Federal court; and be in good standing before the bar"); DEP'T OF ARMY, REG. 135-100, ARMY NATIONAL GUARD AND ARMY RESERVE: APPOINTMENT OF COMMISSIONED AND WARRANT OFFICERS OF THE ARMY, para. 3-13a(2) (1 Feb. 1984) (application must include certificate or statement from highest court of a state or a federal court showing admission to practice and current standing); DEP'T OF ARMY REG. 690-200, CIVILIAN PERSONNEL: GENERAL PERSONNEL PROVISIONS (approved change 7 pending publication) ch. 213, subchapter 4, para. 4-5b (Department of Army civilian attorney "must be member in good standing (as defined by the pertinent bar) of the bar of a State, territory, the District of Columbia, or the Commonwealth of Puerto Rico").

[10] Communications with Represented Persons, 57 Fed. Reg. 54737 (1992) (to be codified at 28 C.F.R. Part 77) (proposed Nov. 20, 1992).

[11] Communications with Represented Persons, 58 Fed. Reg. 39976 (1993) (to be codified at 28 C.F.R. Part 77) (proposed July 26, 1993).

[12] Graves v. State, 619 A.2d 123 (Md. App. 1993).

[13] *Cf.* AR 27-26, *supra* note 1, rule 1.10(a).

[14] *Id.* rule 1.10.

Guard and Reserve Affairs Items

Guard and Reserves Affairs Division, OTJAG

The Judge Advocate General's Continuing Legal Education (On-Site) Schedule Update

The following is an updated schedule of The Judge Advocate General's continuing legal education On-Sites. Note that the dates have changed for the Columbus and New Orleans On-Sites. If you have any questions concerning the On-Site schedule direct them to the local action officer or CPT David L. Parker, Chief, Unit Liaison and Training Office, Guard and Reserve Affairs Division, Office of The Judge Advocate General, telephone (804) 972-6380.

The Judge Advocate General's School Continuing Legal Education (On-Site) Training, Academic Year 1994

DATE	CITY, HOST UNIT AND TRAINING SITE	AC GO/RC GO SUBJECT/INSTRUCTOR/GRA REP		ACTION OFFICER
13-14 Nov 93	New York City, NY 77th ARCOM/4th LSO Fordham Law School New York, NY 10023	AC GO RC GO Ad & Civ Law Contract Law GRA Rep	 Cullen/Lassart/Sagsveen MAJ Block MAJ Tomanelli COL Schempf	LTC John Greene 437 73d Street Brooklyn, NY 11209 (212) 264-0650
20-21 Nov 93	Boston, MA 94th ARCOM/3d LSO Hanscom Air Force Base Bedford, MA 01731	AC GO RC GO Criminal Law Ad & Civ Law GRA Rep	 COL Lassart MAJ Masterton MAJ Drummond LTC Hamilton	MAJ Donald Lynde 94th ARCOM Bldg. 1607 Hanscom AF Base, MA 01731 (617) 377-2845
8-9 Jan 94	Long Beach, CA 78th LSO Long Beach Marriott Inn Long Beach, CA 90815	AC GO RC GO Ad & Civ Law Criminal Law GRA Rep	 COL Sagsveen LTC McFetridge MAJ Burrell Dr. Foley	MAJ John C. Tobin 10541 Calle Lee Suite 101 Los Alamitos, CA 90720 (714) 752-1455
21-23 Jan 94	San Antonio, TX 90th ARCOM San Antonio Airport Hilton San Antonio, TX 78216	AC GO RC GO Ad & Civ Law Contract Law GRA Rep	 COL Cullen MAJ Emswiler LTC Dorsey COL Schempf	CPT William Hintze HQ, 90th ARCOM 1920 Harry Wurzbach Hwy. San Antonio, TX 78209 (210) 221-5164
29-30 Jan 94	Seattle, WA 6th LSO Univ. of Washington Law School Seattle, WA 78205	AC GO RC GO Criminal Law Int'l. Law GRA Rep	 COL Cullen MAJ O'Hare LCDR Winthrop LTC Hamilton	MAJ Mark W. Reardon 6th LSO Bldg. 572 Fort Lawton, WA 98199 (206) 281-3002
26-27 Feb 94	Salt Lake City, UT UT ARNG HQ, Utah National Guard 12953 Minuteman Drive Draper, UT 84020-1776	AC GO RC GO Criminal Law Contract Law GRA Rep	 COL Sagsveen MAJ Wilkins MAJ Killham CPT Parker	MAJ Patrick Casaday HQ, UT ARNG P.O. Box 1776 Draper, UT 84020-1776 (801) 576-3682
26-27 Feb 94	Denver, CO 87th LSO Edgar L. McWethy, Jr. USARC Bldg. 820 Fitzsimons Army Medical Ctr Aurora, CO 80045-7050	AC GO RC GO Criminal Law Contract Law GRA Rep	 COL Cullen MAJ Wilkins MAJ Killham Dr. Foley	LTC Dennis J. Wing Bldg. 820 McWethy USARC Fitzsimons AMC Aurora, CO 80045-7050 (303) 343-6774

The Judge Advocate General's
School Continuing Legal Education (On-Site) Training, Academic Year 1994

DATE	CITY, HOST UNIT AND TRAINING SITE	AC GO/RC GO SUBJECT/INSTRUCTOR/GRA REP		ACTION OFFICER
5-6 Mar 94	Columbia, SC 120th ARCOM University of South Carolina Law School Columbia, SC 29208	AC GO RC GO Int'l Law Ad & Civ Law GRA Rep	 COL Sagsveen MAJ Hudson MAJ Jennings LTC Menk	MAJ Robert H. Uehling 209 South Springs Road Columbia, SC 29223 (803) 733-2878
12-13 Mar 94	Washington, D.C. 10th LSO NWC (Arnold Auditorium) Fort Lesley J. McNair Washington, D.C. 20319	AC GO RC GO Criminal Law Ad & Civ Law GRA Rep	 COL Lassart MAJ Winn MAJ Diner CPT Parker	CPT Robert J. Moore 10011 Indian Queen Pt. Rd. Fort Washington, MD 20744 (202) 835-7610
19-20 Mar 94	San Francisco, CA 5th LSO Sixth Army Conference Room Bldg. 35 Presidio of SF, CA 94129	AC GO RC GO Criminal Law Int'l Law GRA Rep	 Cullen/Lassart/Sagsveen MAJ Jacobson MAJ Warren COL Schempf	MAJ Robert Jesinger 20683 Greenleaf Drive Cupertino, CA 95014-8808 (408) 297-9172
25-27 Mar 94	New Orleans, LA 122nd ARCOM Sheraton on the Lake Hotel Metairie, LA 70033	AC GO RC GO Int'l Law Criminal Law GRA Rep	 COL Lassart MAJ Johnson MAJ Hunter Dr. Foley	LTC George Simno Leroy Johnson Drive New Orleans, LA 70146 (504) 282-6439
9-10 Apr 94 NOTE: May be cancelled.	Fort Wayne, IN Marriott Hotel 305 E. Washington Center Road Fort Wayne, IN 46825 (219) 484-0411	AC GO RC GO Contract Law Int'l Law GRA Rep	 COL Sagsveen MAJ DeMoss MAJ Warren LTC Menk	MAJ Byron N. Miller 200 Tyne Road Louisville, KY 40207 (502) 587-3400
23-24 Apr 94	Atlanta, GA 81st ARCOM TBD	AC GO RC GO Criminal Law Int'l Law GRA Rep	 COL Lassart MAJ Hayden LTC Crane COL Schempf	MAJ Carey Herrin 81st ARCOM 1514 E. Cleveland Avenue East Point, GA 30344 (404) 559-5484
7-8 May 94	Gulf Shores, AL 121st ARCOM/ALARNG Gulf State Park Resort Hotel Gulf Shores, AL 36547	AC GO RC GO Ad & Civ Law Int'l Law GRA Rep	 COL Sagsveen MAJ Peterson MAJ Warner LTC Menk	LTC Samuel A. Rumore 5025 Tenth Court, South Birmingham, AL 35222 (205) 323-8957
14-15 May 94	Columbus, OH 83d ARCOM/9th LSO/ OH STARC TBD	AC GO RC GO Contract Law Int'l Law GRA Rep	 COL Cullen MAJ Causey LTC Crane CPT Parker	LTC Thomas G. Shumacher 762 Woodview Drive Edgewood, KY 41017-9637 (513) 684-3583

CLE News

1. Resident Course Quotas

Attendance at resident CLE courses at The Judge Advocate General's School (TJAGSA) is restricted to those who have been allocated student quotas. Quotas for TJAGSA CLE courses are managed by means of the Army Training Requirements and Resources System (ATRRS), the Army-wide automated quota management system. The ATRRS school code for TJAGSA is 181. **If you do not have a confirmed quota in ATRRS, you do not have a quota for a TJAGSA CLE course.** Active duty service members must obtain quotas through their directorates of training or through equivalent agencies. Reservists must obtain quotas through their unit training offices or, if they are nonunit reservists, through ARPERCEN, ATTN: DARP-OPS-JA, 9700 Page Boulevard, St. Louis, MO 63132-5200. Army National Guard personnel request quotas through their unit training offices. To verify a quota, ask your training office to provide you with a screen print of the ATRRS R1 screen showing by-name reservations.

2. TJAGSA CLE Course Schedule

1993

2-3 December: 2d Procurement Fraud Orientation (5F-F37).

6-10 December: USAREUR Operational Law CLE (5F-F47E).

6-10 December: 121st Senior Officers' Legal Orientation Course (5F-F1).

1994

3-7 January: 44th Federal Labor Relations Course (5F-F22).

10-13 January: USAREUR Tax CLE (5F-F28E).

10-14 January: 1994 Government Contract Law Symposium (5F-F11).

18 January-25 March: 133d Basic Course (5-27-C20).

24-28 January: PACOM Tax CLE (5F-F28P).

31 January-4 February: 32d Criminal Trial Advocacy Course (5F-F32).

7-11 February: 122d Senior Officers' Legal Orientation Course (5F-F1).

22 February-4 March: 132d Contract Attorneys' Course (5F-F10).

7-11 March: USAREUR Fiscal Law CLE (5F-F12E). (Note: Some states may withhold continuing legal education credit for attendance at the Fiscal Law Course because nonattorneys attend the course).

7-11 March: 34th Legal Assistance Course (5F-F23).

21-25 March: 18th Administrative Law for Military Installations Course (5F-F24).

28 March-1 April: 7th Government Materiel Acquisition Course (5F-F17).

4-8 April: 18th Operational Law Seminar (5F-F47).

11-15 April: 123d Senior Officers' Legal Orientation Course (5F-F1).

11-15 April: 56th Law of War Workshop (5F-F42).

18-21 April: 1994 Reserve Component Judge Advocate Workshop (5F-F56).

25-29 April: 5th Law for Legal NCOs Course (512-71D/E/20/30).

2-6 May: 38th Fiscal Law Course (5F-F12). (Note: Some states may withhold continuing legal education credit for attendance at the Fiscal Law Course because nonattorneys attend the course).

16-20 May: 39th Fiscal Law Course (5F-F12). (Note: Some states may withhold continuing legal education credit for attendance at the Fiscal Law Course because nonattorneys attend the course).

16 May-3 June: 37th Military Judges' Course (5F-F33).

23-27 May: 45th Federal Labor Relations Course (5F-F22).

6-10 June: 124th Senior Officers' Legal Orientation Course (5F-F1).

13-17 June: 24th Staff Judge Advocate Course (5F-F52).

20 June-1 July: JAOAC (Phase II) (5F-F55).

20 June-1 July: JATT Team Training (5F-F57).

6-8 July: Professional Recruiting Training Seminar.

11-15 July: 5th Legal Administrators' Course (7A-550A1).

11-15 July: 6th STARC Judge Advocate Mobilization and Training Workshop.

13-15 July: 25th Methods of Instruction Course (5F-F70).

18-29 July: 133d Contract Attorneys' Course (5F-F10).

18 July-23 September: 134th Basic Course (5-27-C20).

1-5 August: 57th Law of War Workshop (5F-F42).

1 August 1994-12 May 1995: 43d Graduate Course (5-27-C22).

8-12 August: 18th Criminal Law New Developments Course (5F-F35).

15-19 August: 12th Federal Litigation Course (5F-F29).

15-19 August: 4th Senior Legal NCO Management Course (512-71D/E/40/50).

22-26 August: 125th Senior Officers' Legal Orientation Course (5F-F1).

29 August-2 September: 19th Operational Law Seminar (5F-F47).

7-9 September: USAREUR Legal Assistance CLE (5F-F23E).

12-16 September: USAREUR Administrative Law CLE (5F-F24E).

12-16 September: 11th Contract Claims, Litigation and Remedies Course (5F-F13).

3. Civilian Sponsored CLE Courses

February 1994

1-4, ESI: Preparing and Analyzing Statements of Work and Specifications, Washington, D.C.

7-8, ESI: Incentive Contracting: Motivating and Rewarding Excellence, Washington, D.C.

7-11, GWU: Government Contract Law, Orlando, FL.

8-11, ESI: Subcontracting, San Diego, CA.

10-11, GWU: Procurement Law Research Workshop, Washington, D.C.

14-18, GWU: Administration of Government Contracts, Washington, D.C.

15-16, ESI: Electronic Commerce, Washington, D.C.

22-25, ESI: Contracting for Services, Washington, D.C.

23-24, GWU: Government Contract Claims, San Diego, CA.

23-25, GWU: Schedule Contracting: Selling Commercial Products and Services, Washington, D.C.

For further information on civilian courses, please contact the institution offering the course. The addresses are listed in the September 1993 issue of *The Army Lawyer*.

4. Mandatory Continuing Legal Education Jurisdictions and Reporting Dates

Jurisdiction	Reporting Month
Alabama**	31 December annually
Arizona	15 July annually
Arkansas	30 June annually
California*	1 February annually
Colorado	Anytime within three-year period
Delaware	31 July biennially
Florida**	Assigned month triennially
Georgia	31 January annually
Idaho	Admission date triennially
Indiana	31 December annually
Iowa	1 March annually
Kansas	1 July annually
Kentucky	30 June annually
Louisiana**	31 January annually
Michigan	31 March annually
Minnesota	30 August triennially
Mississippi**	1 August annually
Missouri	31 July annually
Montana	1 March annually
Nevada	1 March annually
New Hampshire**	1 August annually
New Mexico	30 days after program
North Carolina**	28 February annually
North Dakota	31 July annually
Ohio*	31 January biennially
Oklahoma**	15 February annually
Oregon	Anniversary of date of birth—new admittees and reinstated members report after an initial one-year period; thereafter triennially
Pennsylvania**	Annually as assigned
Rhode Island	30 June annually
South Carolina**	15 January annually
Tennessee*	1 March annually
Texas	Last day of birth month annually
Utah	31 December biennially
Vermont	15 July biennially
Virginia	30 June annually
Washington	31 January annually
West Virginia	30 June biennially
Wisconsin*	20 January biennially
Wyoming	30 January annually

For addresses and detailed information, see the July 1993 issue of *The Army Lawyer*.

*Military exempt
**Military must declare exemption

Current Material of Interest

1. TJAGSA Materials Available Through Defense Technical Information Center

Each year, TJAGSA publishes deskbooks and materials to support resident instruction. Much of this material is useful to judge advocates and government civilian attorneys who are unable to attend courses in their practice areas. The School receives many requests each year for these materials. Because the distribution of these materials is not in the School's mission, TJAGSA does not have the resources to provide these publications.

To provide another avenue of availability, some of this material is being made available through the Defense Technical Information Center (DTIC). An office may obtain this material in two ways. The first is through a user library on the installation. Most technical and school libraries are DTIC "users." If they are "school" libraries, they may be free users. The second way is for the office or organization to become a government user. Government agency users pay five dollars per hard copy for reports of 1-100 pages and seven cents for each additional page over 100, or ninety-five cents per fiche copy. Overseas users may obtain one copy of a report at no charge. The necessary information and forms to become registered as a user may be requested from: Defense Technical Information Center, Cameron Station, Alexandria, VA 22314-6145, telephone: commercial (703) 274-7633, DSN 284-7633.

Once registered, an office or other organization may open a deposit account with the National Technical Information Service to facilitate ordering materials. Information concerning this procedure will be provided when a request for user status is submitted.

Users are provided biweekly and cumulative indices. These indices are classified as a single confidential document and mailed only to those DTIC users whose organizations have a facility clearance. This will not affect the ability of organizations to become DTIC users, nor will it affect the ordering of TJAGSA publications through DTIC. All TJAGSA publications are unclassified and the relevant ordering information, such as DTIC numbers and titles, will be published in *The Army Lawyer*. The following TJAGSA publications are available through DTIC. The nine character identifier beginning with the letters AD are numbers assigned by DTIC and must be used when ordering publications.

Contract Law

AD A265755 Government Contract Law Deskbook Vol 1/JA-501-1-93 (499 pgs).

AD A265756 Government Contract Law Deskbook, Vol 2/JA-501-2-93 (481 pgs).

*AD A265777 Fiscal Law Course Deskbook/JA-506(93) (471 pgs).

Legal Assistance

AD B092128 USAREUR Legal Assistance Handbook/ JAGS-ADA-85-5 (315 pgs).

AD A263082 Real Property Guide—Legal Assistance/JA-261(93) (293 pgs).

AD A259516 Legal Assistance Guide: Office Directory/ JA-267(92) (110 pgs).

AD B164534 Notarial Guide/JA-268(92) (136 pgs).

AD A228272 Legal Assistance: Preventive Law Series/JA-276-90 (200 pgs).

AD A266077 Soldiers' and Sailors' Civil Relief Act Guide/ JA-260(93) (206 pgs).

AD A266177 Wills Guide/JA-262(93) (464 pgs).

*AD A268007 Family Law Guide/JA 263(93) (589 pgs).

AD A266351 Office Administration Guide/JA 271(93) (230 pgs).

AD B156056 Legal Assistance: Living Wills Guide/JA-273-91 (171 pgs).

*AD A269073 Model Income Tax Assistance Guide/JA 275-(93) (66 pgs).

AD A246280 Consumer Law Guide/JA 265-92 (518 pgs).

AD A259022 Tax Information Series/JA 269(93) (117 pgs).

AD A256322 Legal Assistance: Deployment Guide/JA-272(92) (364 pgs).

AD A260219 Air Force All States Income Tax Guide—January 1993.

Administrative and Civil Law

AD A199644 The Staff Judge Advocate Officer Manager's Handbook/ACIL-ST-290.

*AD A269515 Federal Tort Claims Act/JA 241(93) (167 pgs).

AD A258582 Environmental Law Deskbook, JA-234-1(92) (517 pgs).

AD A255038 Defensive Federal Litigation/JA-200(92) (840 pgs).

AD A255346 Reports of Survey and Line of Duty Determinations/JA 231-92 (89 pgs).

*AD A269036 Government Information Practices/JA-235 (93) (322 pgs).

AD A259047 AR 15-6 Investigations/JA-281(92) (45 pgs).

Labor Law

AD A256772 The Law of Federal Employment/JA-210(92) (402 pgs).

AD A255838 The Law of Federal Labor-Management Relations/JA-211-92 (430 pgs).

Developments, Doctrine, and Literature

AD A254610 Military Citation, Fifth Edition/JAGS-DD-92 (18 pgs).

Criminal Law

AD A260531 Crimes and Defenses Deskbook/JA 337(92) (220 pgs).

AD A260913 Unauthorized Absences/JA 301(92) (86 pgs).

AD A251120 Criminal Law, Nonjudicial Punishment/JA-330(92) (40 pgs).

AD A251717 Senior Officers Legal Orientation/JA 320(92) (249 pgs).

AD A251821 Trial Counsel and Defense Counsel Handbook/JA 310(92) (452 pgs).

AD A261247 United States Attorney Prosecutions/JA-338(92) (343 pgs).

International Law

AD A262925 Operational Law Handbook (Draft)/JA 422(93) (180 pgs).

Reserve Affairs

AD B136361 Reserve Component JAGC Personnel Policies Handbook/JAGS-GRA-89-1 (188 pgs).

The following CID publication also is available through DTIC:

AD A145966 USACIDC Pam 195-8, Criminal Investigations, Violation of the USC in Economic Crime Investigations (250 pgs).

Those ordering publications are reminded that they are for government use only.

*Indicates new publication or revised edition.

2. Regulations and Pamphlets

Obtaining Manuals for Courts-Martial, *DA Pamphlets, Army Regulations, Field Manuals, and Training Circulars.*

(1) The U.S. Army Publications Distribution Center (USAPDC) at Baltimore stocks and distributes DA publications and blank forms that have Army-wide use. Its address is:

Commander
U.S. Army Publications
Distribution Center
2800 Eastern Blvd.
Baltimore, MD 21220-2896

(2) Units must have publications accounts to use any part of the publications distribution system. The following extract from *Department of the Army Regulation 25-30, The Army Integrated Publishing and Printing Program,* paragraph 12-7c (28 February 1989) is provided to assist Active, Reserve, and National Guard units.

The units below are authorized publications accounts with the USAPDC.

(*1*) *Active Army.*

(*a*) *Units organized under a PAC.* A PAC that supports battalion-size units will request a consolidated publications account for the entire battalion except when subordinate units in the battalion are geographically remote. To establish an account, the PAC will forward a DA Form 12-R (Request for Establishment of a Publications Account) and supporting DA 12-series forms through their DCSIM or DOIM, as appropriate, to the Baltimore USAPDC, 2800 Eastern Boulevard, Baltimore, MD 21220-2896. The PAC will manage all accounts established for the battalion it supports. (Instructions for the use of DA 12-series forms and a reproducible copy of the forms appear in DA Pam. 25-33.)

(*b*) *Units not organized under a PAC.* Units that are detachment size and above may have a publications account. To establish an account, these units will submit a DA Form 12-R and supporting DA 12-series forms through their DCSIM or DOIM, as appropriate, to the Baltimore USAPDC, 2800 Eastern Boulevard, Baltimore, MD 21220-2896.

(*c*) *Staff sections of FOAs, MACOMs, installations, and combat divisions.* These staff sections may establish a single account for each major staff element. To establish an account, these units will follow the procedure in (*b*) above.

(2) *ARNG units that are company size to State adjutants general.* To establish an account, these units will submit a DA Form 12-R and supporting DA 12-series forms through their State adjutants general to the Baltimore USAPDC, 2800 Eastern Boulevard, Baltimore, MD 21220-2896.

(3) *USAR units that are company size and above and staff sections from division level and above.* To establish an account, these units will submit a DA Form 12-R and supporting DA 12-series forms through their supporting installation and CONUSA to the Baltimore USAPDC, 2800 Eastern Boulevard, Baltimore, MD 21220-2896.

(4) *ROTC elements.* To establish an account, ROTC regions will submit a DA Form 12-R and supporting DA 12-series forms through their supporting installation and TRADOC DCSIM to the Baltimore USAPDC, 2800 Eastern Boulevard, Baltimore, MD 21220-2896. Senior and junior ROTC units will submit a DA Form 12-R and supporting DA 12-series forms through their supporting installation, regional headquarters, and TRADOC DCSIM to the Baltimore USAPDC, 2800 Eastern Boulevard, Baltimore, MD 21220-2896.

Units not described in [the paragraphs] above also may be authorized accounts. To establish accounts, these units must send their requests through their DCSIM or DOIM, as appropriate, to Commander, USAPPC, ATTN: ASQZ-NV, Alexandria, VA 22331-0302.

Specific instructions for establishing initial distribution requirements appear in DA Pam. 25-33.

If your unit does not have a copy of *DA Pam. 25-33,* you may request one by calling the Baltimore USAPDC at (410) 671-4335.

(3) Units that have established initial distribution requirements will receive copies of new, revised, and changed publications as soon as they are printed.

(4) Units that require publications that are not on their initial distribution list can requisition publications using *DA Form 4569.* All *DA Form 4569* requests will be sent to the Baltimore USAPDC, 2800 Eastern Boulevard, Baltimore, MD 21220-2896. You may reach this office at (410) 671-4335.

(5) Civilians can obtain DA Pams through the National Technical Information Service (NTIS), 5285 Port Royal Road, Springfield, Virginia 22161. You may reach this office at (703) 487-4684.

(6) Navy, Air Force, and Marine Corps JAGs can request up to ten copies of DA Pams by writing to USAPDC, ATTN: DAIM-APC-BD, 2800 Eastern Boulevard, Baltimore, MD 21220-2896. You may reach this office at (410) 671-4335.

b. Listed below are new publications and changes to existing publications.

Number	Title	Date
AR 5-14	Management of Contracted Advisory and Assistance Services	15 Jan 93
AR 30-18	Army Troop Issue Subsistence Activity Operating Policies	4 Jan 93
AR 135-156	Military Publications Personnel Management of General Officers, Interim Change 101	1 Feb 93
CIR 11-92-3	Internal Control Review Checklist	31 Oct 92
CIR 608-93-1	The Army Family Action Plan X	15 Jan 93
JFTR	Joint Federal Travel Regulations, Change 75	1 Mar 93
UPDATE 16	Enlisted Ranks Personnel Update Handbook, Change 3	27 Nov 93

3. LAAWS Bulletin Board Service

a. The Legal Automation Army-Wide System (LAAWS) operates an electronic bulletin board (BBS) dedicated to serving the Army legal community and certain approved DOD agencies. The LAAWS BBS is the successor to the OTJAG BBS formerly operated by the OTJAG Information Management Office. Access to the LAAWS BBS currently is restricted to the following individuals:

1) Active duty Army judge advocates;

2) Civilian attorneys employed by the Department of the Army;

3) Army Reserve and Army National Guard judge advocates on active duty, or employed full time by the federal government;

4) Active duty Army legal administrators, noncommissioned officers, and court reporters;

5) Civilian legal support staff employed by the Judge Advocate General's Corps, U.S. Army;

6) Attorneys (military and civilian) employed by certain supported DOD agencies (e.g., DLA, CHAMPUS, DISA, HQS); and

7) Individuals with approved, written exceptions to policy.

Requests for exceptions to the access policy should be submitted to the following address:

LAAWS Project Officer
Attn: LAAWS BBS SYSOPS
Mail Stop 385, Bldg. 257
Fort Belvoir, VA 22060-5385

b. Effective 2 November 1992, the LAAWS BBS system was activated at its new location, the LAAWS Project Office at Fort Belvoir, Virginia. In addition to this physical transition, the system has undergone a number of hardware and software upgrades. The system now runs on a 80486 tower, and all lines are capable of operating at speeds up to 9600 baud. While these changes will be transparent to the majority of users, they will increase the efficiency of the BBS, and provide faster access to those with high-speed modems.

c. Numerous TJAGSA publications are available on the LAAWS BBS. Users can sign on by dialing commercial (703) 805-3988, or DSN 655-3988 with the following telecommunications configuration: 9600/2400/1200 baud; parity-none; 8 bits; 1 stop bit; full duplex; Xon/Xoff supported; VT100 or ANSI terminal emulation. Once logged on, the system greets the user with an opening menu. Members need only answer the prompts to call up and download desired publications. The system will ask a new user to answer several questions and tell him or her that access will be granted to the LAAWS BBS after receiving membership confirmation, which takes approximately twenty-four hours. *The Army Lawyer* will publish information on new publications and materials as they become available through the LAAWS BBS.

d. *Instructions for Downloading Files From the LAAWS Bulletin Board Service.*

(1) Log on to the LAAWS BBS using ENABLE and the communications parameters listed in subparagraph c, above.

(2) If you have never downloaded files before, you will need the file decompression utility program that the LAAWS BBS uses to facilitate rapid transfer over the phone lines. This program is known as the PKUNZIP utility. To download it on to your hard drive, take the following actions after logging on:

(a) When the system asks, "Main Board Command?" Join a conference by entering [j].

(b) From the Conference Menu, select the Automation Conference by entering [12] and hit the enter key when ask to view other conference members.

(c) Once you have joined the Automation Conference, enter [d] to Download a file off the Automation Conference menu.

(d) When prompted to select a file name, enter [pkz 110.exe]. This is the PKUNZIP utility file.

(e) If prompted to select a communications protocol, enter [x] for X-modem protocol.

(f) The system will respond by giving you data such as download time and file size. You should then press the F10 key, which will give you a top-line menu. If you are using ENABLE 3.XX from this menu, select [f] for Files, followed by [r] for Receive, followed by [x] for X-modem protocol. The menu will then ask for a file name. Enter [c:\pkz110.exe].

(g) If you are using ENABLE 4.0 select the PROTOCOL option and select which protocol you wish to use X-modem-checksum. Next select the RECEIVE option and enter the file name "pkz110.exe" at the prompt.

(h) The LAAWS BBS and your computer will take over from here. Downloading the file takes about fifteen to twenty minutes. ENABLE will display information on the progress of the transfer as it occurs. Once the operation is complete the BBS will display the message "File transfer completed.." and information on the file. Your hard drive now will have the compressed version of the decompression program needed to explode files with the ".ZIP" extension.

(i) When the file transfer is complete, enter [a] to Abandon the conference. Then enter [g] for Good-bye to log-off the LAAWS BBS.

(j) To use the decompression program, you will have to decompress, or explode, the program itself. To accomplish this, boot-up into DOS and enter [pkz110] at the C:\> prompt. The PKUNZIP utility will then execute, converting its files to usable format. When it has completed this process, your hard drive will have the usable, exploded version of the PKUNZIP utility program, as well as all of the compression/decompression utilities used by the LAAWS BBS.

(3) To download a file, after logging on to the LAAWS BBS, take the following steps:

(a) When ask to select a "Main Board Command?" enter [d] to Download a file.

(b) Enter the name of the file you want to download from subparagraph c, below. A listing of available files can be viewed by selecting File Directories from the main menu.

(c) When prompted to select a communications protocol, enter [x] for X-modem (ENABLE) protocol.

(d) After the LAAWS BBS responds with the time and size data, you should press the F10 key, which will give you

the ENABLE top-line menu. If you are using ENABLE 3.XX select [f] for Files, followed by [r] for Receive, followed by [x] for X-modem protocol. If you are using ENABLE 4.0 select the PROTOCOL option and select which protocol you wish to use X-modem-checksum. Next select the RECEIVE option.

(e) When ask to enter a file name enter [c:\xxxxx.yyy] where xxxxx.yyy is the name of the file you wish to download.

(f) The computers take over from here. Once the operation is complete the BBS will display the message "File transfer completed.." and information on the file. The file you downloaded will have been saved on your hard drive.

(g) After the file transfer is complete, log off of the LAAWS BBS by entering [g] to say Good-bye.

(4) To use a downloaded file, take the following steps:

(a) If the file was not compressed, you can use it in ENABLE without prior conversion. Select the file as you would any ENABLE word processing file. ENABLE will give you a bottom-line menu containing several other word processing languages. From this menu, select "ASCII." After the document appears, you can process it like any other ENABLE file.

(b) If the file was compressed (having the ".ZIP" extension) you will have to "explode" it before entering the ENABLE program. From the DOS operating system C:\> prompt, enter [pkunzip{space}xxxxx.zip] (where "xxxxx.zip" signifies the name of the file you downloaded from the LAAWS BBS). The PKUNZIP utility will explode the compressed file and make a new file with the same name, but with a new ".DOC" extension. Now enter ENABLE and call up the exploded file "XXXXX.DOC", by following instructions in paragraph (4)(a), above.

e. *TJAGSA Publications Available Through the LAAWS BBS.* The following is a current list of TJAGSA publications available for downloading from the LAAWS BBS (Note that the date UPLOADED is the month and year the file was made available on the BBS; publication date is available within each publication):

FILENAME	UPLOADED	DESCRIPTION
1990_YIR.ZIP	January 1991	This is the 1990 Year in Review article in ASCII format. It originally was provided at the 1991 Government Contract Law Symposium at TJAGSA.
261.ZIP	April 1993	Legal Assistance Real Property Guide March 1993.
505-1.ZIP	March 1993	Contract Attorneys' Deskbook, Volume 1, 129th Contract Attorneys' Course, March 1993.
505-2.ZIP	June 1992	Volume 2 of the May 1992 Contract Attorneys' Course Deskbook.
506.ZIP	November 1991	The November 1991 Fiscal Law Deskbook from the Contract Law Division at TJAGSA.
93CLASS.ASC	July 1992	FY93 TJAGSA Class Schedule; ASCII.
93CLASS.EN	July 1992	FY93 TJAGSA Class Schedule; ENABLE 2.15.
93CRS.ASC	July 1992	FY93 TJAGSA Course Schedule, ASCII.
93CRS.EN	July 1992	FY93 TJAGSA Course Schedule; ENABLE 2.15.
ALAW.ZIP	June 1990	*Army Lawyer/Military Law Review* Database ENABLE 2.15. Updated through 1989 Army Lawyer Index. It includes a menu system and an explanatory memorandum, ARLAWMEM.WPF.
BBS-POL.ZIP	December 1992	Draft of LAAWS BBS operating procedures for the TJAGSA policy counsel representative.
BULLETIN.TXT	June 1993	List of eduational television programs maintained in the Video Information Library at TJAGSA of actual classroom instructions presented at the school and video productions.
CCLR.ZIP	September 1990	Contract Claims, Litigation, & Remedies.
CLG.EXE	December 1992	Consumer Law Guide Excerpts. Documents were created in WordPerfect 5.0 or Harvard Graphics 3.0 and zipped into executable file.
DEPLOY.EXE	December 1992	Deployment Guide Excerpts. Documents were created in Word Perfect 5.0 and zipped into executable file.

FILENAME	UPLOADED	DESCRIPTION
FISCALBK.ZIP	November 1990	The November 1990 Fiscal Law Deskbook from the Contract Law Division, TJAGSA.
FSO 201.ZIP	October 1992	Update of FSO Automation Program. Download to hard—only source disk, unzip to floppy, then A:INSTALLA or B:INSTALLB.
JA200A.ZIP	August 1993	Defensive Federal Litigation—Part A, June 1993.
JA200B.ZIP	August 1993	Defensive Federal Litigation—Part B, June 1993.
JA210.ZIP	October 1992	Law of Federal Employment, October 1992.
JA211.ZIP	August 1992	Law of Federal Labor—Management Relations, July 1992.
JA231.ZIP	October 1992	Reports of Survey and Line of Duty Determinations—Programmed Instruction.
JA235-92.ZIP	August 1992	Government Information Practices, July 1992 ed. Updates JA235.zip.
JA235.ZIP	August 1993	Government Information Practices.
JA241.ZIP	March 1992	Federal Tort Claims Act.
JA260.ZIP	September 1983	Soldiers' & Sailors' Civil Relief Act. Updated September 1993.
JA261.ZIP	March 1992	Legal Assistance Real Property Guide.
JA262.ZIP	March 1992	Legal Assistance Wills Guide.
JA263.ZIP	August 1993	Family Law Guide. Updated 31 August 1993.
JA267.ZIP	January 1993	Legal Assistance Office Directory, October 1992.
JA267.ZIP	January 1993	Legal Assistance Office Directory.
JA268.ZIP	January 1993	Legal Assistance Notorial Guide, June 1992.
JA268.ZIP	January 1993	Legal Assistance Notorial Guide.
JA269.ZIP	January 1993	Federal Tax Information Series, December 1992.
JA269.ZIP	January 1993	Federal Tax Information Series.
JA271.ZIP	March 1992	Legal Assistance Office Administration Guide.
JA272.ZIP	March 1992	Legal Assistance Deployment Guide.
JA274.ZIP	March 1992	Uniformed Services Former Spouses' Protection Act—Outline and References.
JA275.ZIP	August 1993	Model Tax Assistance Program.
JA276.ZIP	January 1993	Preventive Law Series.
JA276.ZIP	January 1993	Preventive Law Series, December 1992.
JA281.ZIP	November 1992	15-6 Investigations, October 1992.
JA281.ZIP	November 1992	15-6 Investigations.
JA285.ZIP	March 1992	Senior Officer's Legal Orientation.
JA290.ZIP	March 1992	SJA Office Manager's Handbook.
JA301.ZIP	July 1992	Unauthorized Absence—Programmed Text, July 92.
JA310.ZIP	July 1992	Trial Counsel and Defense Counsel Handbook, July 1992.
JA320.ZIP	July 1992	Senior Officers Legal Orientation Criminal Law Text, May 1992.
JA330.ZIP	July 1992	Nonjudicial Punishment—Programmed Text, March 1992.
JA337.ZIP	July 1992	Crimes & Defenses Deskbook, July 1992.
JA4221.ZIP	April 1993	Op Law Handbook, Disk 1 of 5, April 1993 version.
JA4222.ZIP	April 1993	Op Law Handbook, Disk 2 of 5, April 1993 version.
JA4223.ZIP	April 1993	Op Law Handbook, Disk 3 of 5, April 1993 version.
JA4224.ZIP	April 1993	Op Law Handbook, Disk 4 of 5, April 1993 version.
JA4225.ZIP	April 1993	Op Law Handbook, Disk 5 of 5, April 1993 version.
JA501-1.ZIP	June 1993	Volume 1, TJAGSA Contract Law Deskbook, May 1993.
JA501-2.ZIP	June 1993	Volume 2, TJAGSA Contract Law Deskbook, May 1993.

FILENAME	UPLOADED	DESCRIPTION
JA506.ZIP	June 1993	TJAGSA Fiscal Law Deskbook, May 1993.
JA509.ZIP	October 1992	The TJAGSA Deskbook from the 9th Contract Claims, Litigation, and Remedies Course held in September 1992.
JAGSCHL.WPF	March 1992	JAG School report to DSAT. ND-BBS.ZIPJuly 1992TJAGSA Criminal Law New Developments Course Deskbook August 1992.
V1YIR91.ZIP	January 1992	Volume 1 of the TJAGSA's Annual Year in Review for CY 1991 as presented at the January 1992 Contract Law Symposium.
V2YIR91.ZIP	January 1992	Volume 2 of TJAGSA's annual review of contract and fiscal law for calander year 1991.
V3YIR91.ZIP	January 1992	Volume 3 of TJAGSA's annual review of contract and fiscal law for calander year 1991.
VOL2.CAC	March 1993	dkl;a
YIR89.ZIP	January 1990	Contract: Year in Review, 1989.
NA241.ZIP	September 1993	Federal Tort Claims Act, updated August 1993.

f. Reserve and National Guard organizations without organic computer telecommunications capabilities, and individual mobilization augmentees (IMA) having bona fide military needs for these publications, may request computer diskettes containing the publications listed above from the appropriate proponent academic division (Administrative and Civil Law; Criminal Law; Contract Law; International Law; or Developments, Doctrine, and Literature) at The Judge Advocate General's School, Charlottesville, VA 22903-1781. Requests must be accompanied by one 5 1/4-inch or 3 1/2-inch blank, formatted diskette for each file. In addition, a request from an IMA must contain a statement which verifies that he or she needs the requested publications for purposes related to his or her military practice of law.

g. Questions or suggestions concerning the availability of TJAGSA publications on the LAAWS BBS should be sent to The Judge Advocate General's School, Literature and Publications Office, ATTN: JAGS-DDL, Charlottesville, VA 22903-1781. For additional information concerning the LAAWS BBS, contact the System Operator, Sergeant First Class Tim Nugent, commercial (703) 805-2922, DSN 655-2922, or at the address in paragraph a, above.

4. TJAGSA Information Management Items

a. Each member of the staff and faculty at The Judge Advocate General's School (TJAGSA) has access to the Defense Data Network (DDN) for electronic mail (e-mail). To pass information to someone at TJAGSA, or to obtain an e-mail address for someone at TJAGSA, a DDN user should send an e-mail message to:

"postmaster@jags2.jag.virginia.edu"

b. Personnel desiring to reach someone at TJAGSA via DSN should dial 934-7115 to get the TJAGSA receptionist; then ask for the extension of the office you wish to reach.

c. The Judge Advocate General's School also has a toll-free telephone number. To call TJAGSA, dial 1-800-552-3978.

5. The Army Law Library System

With the closure and realignment of many Army installations, the Army Law Library System (ALLS) has become the point of contact for redistribution of materials contained in law libraries on those installations. *The Army Lawyer* will continue to publish lists of law library materials made available as a result of base closures. Law librarians having resources available for redistribution should contact Ms. Helena Daidone, JAGS-DDS, The Judge Advocate General's School, U.S. Army, Charlottesville, VA 22903-1781. Telephone numbers are DSN 934-7115, ext. 394, commercial (804) 972-6394, or facsimile (804) 972-6386.

*U.S. Government Printing Office: 1993 — 300-675/80009

JAGSCHL.WPF	March 1992	JAG School report to DSAT: IND-RRS.ZIP/July 1992/JAGSA Criminal Law New Developments Course Deskbook Annual
VOLUME1.ZIP	January 1992	Volume 1 of TJAGSA's [illegible] Review for CY 1991 as presented at the January 1992 Contract Law Symposium.
VOLUME2.ZIP	January 1992	Volume 2 of TJAGSA's [illegible] year 1991.
[illegible]	January 1992	Volume 3 of TJAGSA's annual review of [illegible] and fiscal law for calendar [illegible]
[illegible]	January 1992	[illegible]
YEAR.ZIP	January 1992	Contract Year in Review.
[illegible]	[illegible]	[illegible] Procedures for Claims and [illegible] updated August 1992.

Requests must be accompanied by one 5 1/4-inch or 3 1/2-inch

4. Reserve and National Guard organizations with [illegible] organic computer telecommunications capabilities, and individual mobilization augmentees (IMA) having bona fide military needs for these publications, may request computer diskettes containing the publications listed above from the appropriate proponent academic division (Administrative and Civil Law; Criminal Law; Contract Law; International Law; or Developments, Doctrine, and Literature) at The Judge Advocate General's School, Charlottesville, VA 22903-1781.

The Judge Advocate General's School, Litigation and [illegible] Clerking, Litigation, and Remedies Course held in September 1992.

TJAGSA Publications Deskbook, May 1992.

[illegible] October 1992

[illegible] June 1992

[illegible]

[illegible]

[illegible]